21-2485-cv

United States Court of Appeals
for the
Second Circuit

REPUBLIC OF TURKEY,

Plaintiff-Counter-Defendant-Appellant,

– v. –

CHRISTIE'S INC., MICHAEL STEINHARDT,

Defendants-Counter-Claimants-Appellees,

JOHN DOES 1-5,

Defendants,

ANATOLIAN MARBLE FEMALE IDOL OF KILLYA TYPE,

Defendant-in-Rem.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the underlying litigation pursuant to 28 U.S.C. §1332(a)(4) because this is a dispute between a foreign state and citizens of a State or of different States and the matter in controversy exceeds $75,000, exclusive of interest and costs. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This is an appeal from a final judgment entered by the United District Court for the Southern District of New York (Nathan, J.), dated September 7, 2021 (the "Judgment").

This appeal was timely filed. The appealed Judgment was entered on September 7, 2021, and the notice of appeal was filed on October 1, 2021.

ISSUES PRESENTED

1. Whether the district court erred by ruling that Appellant Republic of Turkey (the "Republic" or "Turkey") failed under New York law to establish a *prima facie* case that it is the owner of the Defendant-in-rem, an Anatolian marble female idol of Kiliya-type (the "Idol").

2. Whether the district court erred by concluding that the evidence offered by Appellee Michael Steinhardt ("Steinhardt") and Appellee Christie's Inc. ("Christie's") was legally sufficient to establish that the Idol was lawfully acquired and is not stolen property despite their failure to offer affirmative evidence to that effect.

3. Whether the district court was incorrect as a matter of law in determining that the Republic knew or should have known that the Idol belonged to it and had been stolen before it learned that the Idol lacked lawful provenance.

4. Whether the Republic's claim to the Idol could be barred under New York law by the affirmative defense of laches where Steinhardt's admitted indifference to lawful provenance and acknowledged tolerance for risk, not any delay attributable to the Republic, caused Steinhardt to purchase the Idol.

5. Whether the district court erred in concluding that a good faith purchaser is not required under New York law to investigate the provenance of an antiquity in the presence of warning signs, or "red flags," suggesting it is looted foreign patrimony.

6. Whether the Republic's claim to the Idol could be barred under New York law by the affirmative defense of laches where Steinhardt failed to show that witnesses who were unavailable at trial would have provided testimony showing that the Idol was not stolen and was lawfully acquired.

7. Whether the Republic's claim could be barred by the affirmative defense of laches where Steinhardt's own lack of vigilance, not the Republic's purported failure to bring its claim earlier, led to Steinhardt's purchase of the Idol.

8. Whether the district court erred in excluding from its laches analysis the "other acts" evidence offered by the Republic, which demonstrated Steinhardt's

ongoing indifference to lawful provenance when acquiring foreign antiquities such as the Idol.

INTRODUCTION

This is an important case involving a Turkish patrimonial treasure – an extremely rare, nearly completely intact six-thousand-year-old marble statuette, or Kiliya-type idol – which, as a result of the district court's judgment, would be lost to the people of Turkey forever and kept instead by Steinhardt, a wealthy American antiquities collector. It is also a novel case because the court below failed to apply fundamental tenets of New York law in each of its main holdings.

The holding of the court below barring Turkey's claim on alternative laches grounds because it did not take action to recover the Idol before it knew or had reason to know that it belonged to it and had been stolen, is an unwarranted reordering of the longstanding New York rule that requires that the owner of stolen property exercise diligence only after it learns that its property has been stolen – and one that turns New York law on its head. It is also contrary to New York's declared public policy favoring original owners over good faith purchasers in such disputes. No New York court has ever imposed such an obligation on a wronged owner; indeed, the New York courts have expressly eschewed doing so. Moreover, the district court also failed to apply the governing New York rule requiring a good faith purchaser to investigate provenance in the face of "red flags" or warning signs that suggest there

may be a problem with ownership.

But, most importantly, and perhaps most grievously, the district court erred in ignoring fundamental New York law in determining whether Turkey proved that it owns the Idol. New York law provides that, when making a claim for the recovery of a stolen object, a claimant need only make a threshold showing that it has an arguable claim to the stolen object; *the burden then shifts to the current possessor to prove that the object was not stolen*.

The district court failed to properly apply this longstanding New York rule to the evidence presented at trial. The Republic more than met its *prima facie* burden proving that it had a colorable claim of ownership; indeed, it introduced more than sufficient evidence to prove outright its ownership of the Idol. More importantly, the trial court was wrong, as a matter of law, in concluding that Steinhardt sustained his burden and introduced sufficient evidence to prove that the Idol was lawfully removed from Turkey, its conceded birthplace, and was not stolen.

To prevail, Steinhardt had to prove that this Idol was found outside of Turkey or was removed from Turkey before 1906 when Turkey's ownership law applicable to this case – the 1906 Decree – came into effect. But Steinhardt failed to present *any* evidence – let alone sufficient evidence – that the Idol was found outside of Turkey or found and removed from Turkey before the 1906 Decree was in effect. Instead of the affirmative evidence of lawful ownership required to sustain his

burden, Steinhardt presented the court with the speculations of a purported expert whose opinions were not premised on facts and, in all events, concerned Kiliya-type idols generally, not the particular Idol at issue in this case. In awarding ownership to Steinhardt on the basis of mere hypotheses and speculations, the district court ignored New York law allocating the burden of proof in replevin cases and effectively relieved Steinhardt of his obligation to prove by affirmative evidence that the Idol was acquired lawfully and was not stolen property. The Judgment should be vacated and the matter remanded to the district court with direction that judgment be entered declaring that all right, title in and to the Idol is vested in Turkey.

STATEMENT OF THE CASE

The Republic respectfully appeals from a Judgment entered in the District Court (Nathan, J.), denying its claims for replevin, conversion and declaratory relief; declaring that all right, title and interest in the Idol is vested in and to Steinhardt; and granting Steinhardt's and Christie's affirmative defense of laches. *See Republic of Turkey v. Christie's, Inc.*, No. 17-CV-3086 (AJN), 2021 WL 4060357, at *1 (S.D.N.Y. Sept. 7, 2021) (SPA-1-25; SPA-26).[1]

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[1] "A-__" refers to the Joint Appendix and "SPA-__" refers to the Special Appendix submitted herewith.

A. Procedural History

The Republic commenced this action on April 27, 2017 against Christie's and John Does 1-5, the then unknown consignor(s) of the Idol to Christie's. (A-58-66) On May 26, 2017, the Republic filed an amended complaint, adding the Idol as Defendant-in-rem. (A-125-134) On June 21, 2017, the parties submitted a joint stipulation, so ordered by the court, agreeing that the Idol would remain at Christie's (A-156-163), where it remained through the district court proceedings.

On July 27, 2017, the Republic filed a second amended complaint (the "Complaint"), replacing the John Doe defendants with Steinhardt. (A-164-173) The Complaint alleges claims for replevin, damages for conversion and seeks judgment declaring that all right, title, and interest in and to the Idol is vested in the Republic. (*Id.*) Steinhardt and Christie's counterclaimed, alleging tortious interference with contract or, in the alternative, tortious interference with prospective economic advantage, and seeking declaratory judgment that all right, title and interest in and to the Idol is vested in Steinhardt. (A-198-219)

On December 7, 2018, both sides moved for summary judgment. Steinhardt and Christie's moved on the grounds that the Republic's claims were barred by the statute of limitations and that the 1906 Decree is not an ownership law. The Republic moved to dismiss Steinhardt's and Christie's counterclaims for tortious interference with contract and tortious interference with prospective economic

advantage claims. The Republic also moved under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) to exclude the testimony of Steinhardt's and Christie's two proposed expert witnesses. On September 30, 2019, the district court granted the Republic's motion for summary judgment, dismissing Steinhardt's and Christie's counterclaims, and denying Steinhardt's and Christie's motion to dismiss the Republic's claims for relief. The district court reserved decision on the Republic's *Daubert* motion pending trial. (A-220-244)

In its Opinion and Order on summary judgment, the district court made a number of findings, including that: 1) Turkish law governs the question of whether the Republic has a property interest in the Idol, and that the 1906 Decree is a clear ownership law (A-229-230); 2) evidence proffered by the Republic that the Idol was manufactured and excavated in Turkey would be sufficient for the finder of fact to "conclude that the Idol was found in modern-day Turkey" (A-234-235); and 3) evidence proffered by the Republic in response to Steinhardt's and Christie's summary judgment motion was sufficient for a reasonable fact finder to "conclude that the Idol, which was in the hands of American collectors by 1961, was excavated and exported from Turkey shortly before then, while the 1906 Decree was in effect" (A-235).

On March 18, 2021, the district court held a pre-trial conference, at which it denied the Republic's motion *in limine* to introduce "other acts" evidence regarding

the circumstances of Steinhardt's acquisitions of other antiquities and granted Steinhardt's and Christie's motion to exclude certain evidence, to the extent that it concerned Steinhardt's "other acts". (A-47) On March 22, 2021, the district court issued an Order setting forth its rulings at the pre-trial conference. The district court also resolved a number of other motions *in limine* filed by both parties. (A-258-268)

In April 2021, the district court conducted an eight-day bench trial, followed by post-trial briefing by both parties. (A-55 at Dkt. Nos. 468-471) Judgment was entered against the Republic on September 7, 2021 (SPA-26), and the Republic timely appealed (A-3904).

On October 1, 2021, the Republic filed an Emergency Motion for a Stay of Judgment Pending Appeal and Related Relief and Order to Show Cause. (A-56 at Dkt. Nos. 475-479) On October 6, 2021, the district court denied the Republic's motion for a stay and related relief but granted the Republic's request for a stay of enforcement pending resolution of a motion for similar relief by this Court, as long as the Republic made its motion by October 12, 2021. (A-3905-3911) On October 12, 2021, the Republic moved this Court for a stay and an injunction pending appeal. (2nd Cir. Dkt. No. 8) This motion is *sub judice* and the Idol remains at Christie's.

B. Statement of Facts

1. The Idol and Its Turkish Origins

The Republic commenced this action to recover the Idol, an invaluable piece of its cultural patrimony – a six-thousand-year-old Anatolian Kiliya-type marble female Idol – that was looted from its territory in violation of its State ownership law. The Idol is considered one of the most exceptional examples of the few Kiliya-type idols known to exist. (A-2652-2653 at ¶6; A-1118 at 850:5-14; A-247 at ¶12) The consensus of scholars is that the Idol, which measures nine inches (or 22.9 cm) in height, was used in antiquity for some religious or other ritual. (A-2679 at ¶15; A-682-683 at 414:21-415:25; A-2894 at 16:14-22; A-1141-1142 at 873:25-874:20)

The Idol belongs to a Kiliya figurine tradition that is distinctive to Anatolia (A-247 at ¶13) and was manufactured in Kulaksizlar, a site located in modern-day Turkey, in or around the later Middle Chalcolithic period in Turkey (4500–4300 B.C.E.) (A-2677-2678 at ¶¶12-13; A-2158). Kulaksizlar is the home of the only workshop known to have manufactured in antiquity Kiliya-type idols (A-2677-2678 at ¶¶12-13), which were believed to have been manufactured over a period of roughly two to four hundred years. (A-700 at 432:10-21; A-2023) Looting of ancient sites in Kulaksizlar was widespread and continued into the 1990s. (A-2878 at 166:15-22; A-3692; A-2023) Although its uses are unknown, Kiliya type idols

were the subject of local exchange. (A-2873-2874 at 93:18-21, 94:5-22; A-2678-2679 at ¶¶14-15; A-685 at 417:11-22)

2. The Martins' Acquisition of the Idol

The first known appearance of the Idol in modern times was in 1961 when it was sold in the United States to Alastair and Edith Martin by a well-known antiquities dealer who was also known to traffic in looted Turkish antiquities, J.J. Klejman ("Klejman"). (A-246 at ¶5; A-1710; A-1711; A-1721; A-2082; A-2627; A-2652 at ¶4; A-2654 at ¶6(d); A-2658 at ¶12; A-2659 at ¶14; A-2682-2683 at ¶20; A-2690-2691 at ¶35; A-2779-2780 at 35:5-37:5; A-500 at 232:9-17; A-506-508 at 238:19-239:13, 240:4-19) Klejman had a reputation as the favorite "dealer-smuggler" among his customers, including The Metropolitan Museum of Art (the "Met"). (A-2682-2683 at ¶20; A-2690-2691 at ¶35; A-2658 at ¶12; A-508 at 240:4-19) The best known of looted Turkish antiquities sold by Klejman was the "Lydian Hoard," a collection of 363 antiquities acquired by the Met, which were repatriated to the Republic in 1993, after years of a high-profile litigation with Turkey (1987 to 1993). (A-248 at ¶26; A-2690-2692 at ¶¶35-36; A-2695-2696 at ¶43; A-2654 at ¶6(d), A-2659 at ¶14)

Alastair Martin ("Martin") selected the Idol from a "group" of "several" that he was offered by Klejman. (A-1714; A-1716; A-2658 at ¶12; A-2787-2788 at 165:17-22, 166:8-14, 167:8-11) Indeed, Klejman was the source of at least two other

Kiliya-type idols that also appeared in collections in New York in the 1960s. (A-2636-2637 at nos. 16, 17) The Martins purchased the Idol with no record of its discovery or prior ownership, so that the only known provenance for this six-thousand-year-old treasure begins in 1961. (A-2685 at ¶25; A-2652 at ¶¶4-5) Prior to its purchase by the Martins in the early 1960s, there is no record of the Idol's existence.

In 1966, the Martins loaned the Idol, a part of their so-called "Guennol Collection," to the Met. (A-247 at ¶7; A-1711) In 1983, they transferred the Idol to Buttercup Beta Corporation, owned by their son, Robin Martin, and his children. (A-247 at ¶8) Between 1966 and 1993, the Idol was on loan to the Met, and in 1993, it was returned to Robin Martin following his request. (A-2585; A-2781-2782 at 65:5-67:10) Buttercup Beta Corporation shortly thereafter sold the Idol to the Merrin Gallery, a New York antiquities dealer. (A-247 at ¶9)

Martin undoubtedly was aware of the lengthy and well-publicized litigation brought by Turkey against the Met to recover the Lydian Hoard from 1987 to 1993. (A-2690 at ¶34) The Lydian Hoard litigation caught the attention of the entire antiquities world and coincided with both Martin's tenure as honorary trustee at the Met and as an advisory member of the Met's Acquisitions Committee. (A-1195-1197 at 927:15-929:14) An annotated volume of the collection catalogue, published as *The Guennol Collection* (Volume 2. New York: Met Publications [New York]

1975), in Martin's personal archives, includes the following handwritten annotation alongside the entry for the Kiliya Idol: "1990 Turkey may present a problem here, be careful." (A-1721)

3. Steinhardt's Acquisition of the Idol and His Admissions on Risk-Taking in Acquiring Antiquities

On or around August 16, 1993, Steinhardt and his wife, Judy Steinhardt, jointly purchased the Idol from the Merrin Gallery. (A-247 at ¶10) In acquiring the Idol, Steinhardt did not even attempt to contact Martin, whom he knew. Steinhardt testified that he spoke about the Idol only to the Merrin Gallery and people he knew at and through the Met. (A-3800-3802 at ¶¶12, 14-16; A-916-918 at 648:3-10, 648:21-649:1, 650:15-20; A-928-932 at 660:9-661:5, 662:2-664:9) In his direct testimony declaration, Steinhardt testified that the Martins' ownership and the Met's possession of the Idol on loan were provenance enough for him, and therefore, further inquiry was unnecessary. (A-3802 at ¶18)

At the time of Steinhardt's acquisition in 1993, the general problem of theft and smuggling of Turkish antiquities was widely known in the New York antiquities community; Steinhardt was a New York resident and an active and generous supporter of the Met. (A-2691-2692 at ¶36; A-2693-2694 at ¶38) Steinhardt acknowledged knowing of this looting and smuggling problem in a 1996 deposition, in a forfeiture case that was successfully brought against him by the United States government following a seizure in 1995 by the then U.S. Customs Service of another

antiquity, a looted phiale that Steinhardt had purchased, which was forfeited and repatriated to Italy. (*See United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd*, 184 F.3d 131 (2d Cir. 1999); A-2510-2515 at 43:14-45:6, 45:12-22, 48:18-20, 49:3-50:2) In that deposition, which was introduced in evidence in this case, Steinhardt admitted that in or around 1994, he attended "a meeting that was held . . . by a group of people who included some trustees and other friends of the Metropolitan Museum with a lawyer as to how they were going to proceed . . . and what different issues [were] facing The Met vis-à-vis the problem that it had with Turkey." (A-2514 at 49:3-10; A-2693-2694 at ¶38)

Steinhardt further testified in the 1996 deposition that he became aware of the "patrimony issue" in the "period of the nineties," and that it was "a topic that became quite a focus for anybody who was involved in the collecting of ancient art. It was a topic that became focus [sic] because of the Metropolitan Museum's involvement with Turkey." (A-2510-2512 at 43:14-45:22; A-2693-2694 at ¶38) Steinhardt admitted at that time that he well understood that Turkey's laws provided for State ownership of antiquities found within its territory, testifying: "patrimony is related to the issue of ownership of an object that may be found within a national or contemporary national border, and if it's found in the ground in a contemporary Turkey, is it, by definition, therefore the property of the Turkish government . . ." (A-2511 at 44:15-25) In his testimony in this case, Steinhardt testified differently,

swearing that he was unaware of Turkey's cultural patrimony laws in 1993, when he bought the Idol. (A-903 at 635:8-17) When confronted with the inconsistencies between his testimony in this case and his earlier testimony, Steinhardt swore he did not recall his earlier testimony. (A-895-897 at 627:12-629:10; A-899-901 at 631:25-633:15)

Steinhardt testified in this case that, when buying antiquities, "[he] was prepared to take the risk" that some of the ancient art objects he collected "would have issues of provenance." As he explained, "would I under certain circumstances purchase things that were fresh from the ground? Yes. . . Because my overwhelming motivation in buying ancient art was their aesthetics. And aesthetics had almost nothing to do with provenance." (A-2804-2806 at 46:6-13, 51:3-52:2; A-875 at 607:1-8; A-944 at 676:5-11; A-3800 at ¶8)

Steinhardt also explained that he would take the risk even when that risk included that "a governmental body would conclude that this was an object that related to its national patrimony." (A-2805 at 46:14-47:7; A-941-942 at 673:6-674:5) He went on to explain that "[t]he reputation of all ancient art dealers was one that had a dubious quality to it . . . They dealt with the finest museums in the world. But there was this . . . there was this taint over the entire area." (A-2807 at 55:8-56:7) Despite this acknowledged taint, Steinhardt admitted he made no inquiries

about the Idol's ownership prior to the Martins' acquisition. (A-2824-2825 at 156:14-156:19, 158:11-159:12; A-3802 at ¶18)

Steinhardt also offered that he gives short shrift to other countries' ownership laws, like Turkey's. Although aware of efforts to enforce their cultural patrimony laws (including Turkey's claim to the Lydian Hoard and its return to Turkey), he testified that he does not believe that the cultural patrimony laws of other countries should necessitate "confiscation" of antiquities in the United States or from individual collectors, even if those objects were illegally excavated and taken out of the country in violation of those laws. (A-2812-2817 at 103:16-106:8, 107:25-109:19, 110:4-12, 112:8-114:3, 115:3-19, 116:2-8, 117:3-118:3, 118:24-119:11; A-2827-2829 at 245:9-13, 245:25-246:14, 247:17-23, 318:21-320:19)

Steinhardt also testified to his decades-long close relationship with the Met, which he describes as "one of [his] particularly favorite institutions" to which he has contributed substantial sums and loaned various objects over the years. (A-3804 at ¶27; A-882-883 at 614:16-615:16) Steinhardt has been a member of the Met's committee, "Friends of Greek and Roman Art: Philodoroi," since its inception in or around the 1980s. The Philodoroi committee advises on the "political circumstances of collecting Greek and Roman art." (A-884-885 at 616:21-617:4, 617:20-24; A-2817 at 123:10-124:21; A-3804 at ¶27)

4. Steinhardts' Loan and Consignment of the Idol

In 1999, the Judy and Michael Steinhardt Collection loaned the Idol to the Met, where it remained until 2007 when it was returned to Steinhardt. (A-248 at ¶23) The provenance of the Idol was not published before the 2017 Christie's catalogue. (A-2703-2704 at ¶60; A-2652 at ¶¶4-5; A-1083 at 815:18-815:24)

Around March 2, 2017, Steinhardt consigned the Idol to Christie's for sale at its April 28, 2017 auction (the "Auction"). (A-252 at ¶63)

Shortly before the Auction, on or about April 25, 2017, Christie's also contacted a scholar, Dr. Pat Getz-Preziosi (now Getz-Gentle), whom Appellees' proffered expert describes as being "among the world's leading scholars of Neolithic and Chalcolithic statuettes," about Kiliya-type figures. Christie's asked Dr. Getz-Preziosi whether she had "ever come across one that was *not* from Turkey." (A-2073; A-2681 at ¶19) (emphasis added) Her response was: "I have not come across any Kilia [sic] figures that did not come from Turkey." *Id.*

Christie's listed the Idol, along with provenance information, in a catalogue for the Auction. The catalogue included the following provenance for the Idol:

> Alastair Bradley and Edith Martin, New York, acquired 1966 or prior; thence by descent.
> with the Merrin Gallery, New York, acquired from the above, 1993.
> Acquired by the current owner from the above, 16 August 1993.

(A-252 at ¶66) The provenance provided in the Christie's catalogue is the only known written provenance for the Idol and the first ever to be published. (A-2703-2704 at ¶60; A-2652 at ¶¶4-5; A-1083 at 815:18-815:24)

5. The Republic's Claim to the Idol

Around March 26, 2017, the Republic was made aware that the Idol was in the possession of Christie's, and that Christie's intended to include the Idol in its upcoming auction. (A-253 at ¶69) It was only at that time, when the Republic first learned that the Idol lacked any provenance prior to the 1960s, that it had reason to believe that the Idol had been illicitly excavated and consequently took action promptly to make a claim for it. (A-2652-2658 at ¶¶6-11; A-2703-2706 at ¶¶60-65) In April 2017, the Republic demanded the return of the Idol. (A-253 at ¶71) This demand was refused, and the Republic commenced this action on April 27, 2017. (A-253 at ¶¶71-72) On April 28, 2017, Christie's offered the Idol for sale at auction, where it was "sold" to a high bidder. (A-152-153 at ¶¶21-22) The bid for the Idol was ultimately withdrawn. (A-254 at ¶75)

The Republic claims ownership of the Idol under the 1906 Decree, which provides for State ownership of all newly found antiquities without exception. (A-2730 at ¶12; A-2085-2093) The 1906 Decree remained in effect through 1973, when the Republic enacted a new law regarding cultural property. (A-2730 at ¶13; A-2094-2098; A-2099-2107) The district court held that the 1906 Decree is "an

ownership law," and that "under the plain terms of the decree, movable and immovable antiquities found on both public and private lands were the property of the Government of the Ottoman Empire during the time of its existence, and of modern-day Turkey thereafter." (SPA-11) (internal citations removed)

6. No Kiliya-type Idol Has Been Discovered Anywhere Outside of Turkey

No one has ever been able to identify a find site for a Kiliya type Idol outside of Turkey. The few verified discoveries of Kiliya type idols were all unearthed in Western Anatolia in Turkey, including the most recent ones. (A-670-671 at 402:23-403:7; A-2680-2681 at ¶¶17-19; A-1457; A-640-641 at 372:9-373:7; A-686 at 418:15-18)

For example, a Kiliya-type figurine currently housed at the Mytilene Museum on Lesbos in Greece is understood by experts to have been excavated in Turkey. Jürgen Seeher, who compiled the authoritative catalogue of Kiliya figurines in 1992, follows the Greek archaeologist Evangelides in dismissing the theory that it was found in Thermi in Greece, and concludes that it was from the private Grimani collection which was assembled in what is today Turkey. Similarly, writing two years before Seeher, Pat Getz-Preziosi (now Getz-Gentle), drew the same conclusion. (A-2680-2681 at ¶18; A-2286; A-2325) In short, these experts agree that the Mytilene figurine was not found in Greece or any place outside of Turkey.

7. The Idol Was Illegally Removed from Turkey in the 1960s

The Idol, which first surfaced with Klejman and was in the hands of American collectors by 1961, was excavated in Turkey shortly before then. In no fewer than *twelve* well-publicized cases, looted antiquities taken from Turkey appeared on the market outside of Turkey shortly after they were looted. (A-2652-2655 at ¶6; A-2683-2685 at ¶¶22-25) The most notorious of these is the Lydian Hoard, which also first surfaced in New York in the 1960s, and was quickly brought to market shortly after it was looted. *Id*. The Lydian Hoard also was purchased from Klejman in the 1960s. (A-2682-2684 at ¶¶20, 23; A-2695 at ¶43; A-2654 at ¶6(d); A-2658 at ¶12)

At trial, Zeynep Boz, the Director of the Anti-Smuggling Department of the General Directorate in the Ministry of Culture and Tourism of the Republic of Turkey and a former a Specialist in the Anti-Smuggling Branch of the Department of Excavations (A-2746-2448 at ¶¶1, 3), testified that, based on her extensive experience (A-2651 at ¶2), antiquities looted from previously unexcavated sites – like the Idol – are not hidden in Turkey before entering the market; looters want to get them out of the country before authorities learn of and investigate any looted sites. (A-391-394 at 123:18-124:2, 124:20-126:2) Only previously inventoried objects might be kept for a longer period of time before being placed on the market, for the simple reason that such objects are known to exist and therefore could be sought by the authorities immediately after they were stolen. *Id.*

The Republic's archaeology expert, Dr. Neil Brodie, testified that there is virtually no chance that the Idol had been discovered and removed from Turkey before 1906. Discovery of an object of such great interest would likely have attracted notice and publication and there was neither. (A-2685-2686 at ¶26) Indeed, there is no written reference anywhere even to the Idol's existence until 1964, three years after Klejman sold the Idol to Martin. (A-246 at ¶5; A-2685-2686 at ¶¶25, 26; A-2703-2704 at ¶60; A-2652 at ¶¶4-5) In Brodie's opinion, it is inconceivable that the lawful excavation of such a rare and important object would be unrecorded and that the object would then remain unknown and unheralded for the succeeding sixty years. (A-2685-2686 at ¶26)

SUMMARY OF ARGUMENT

New York law provides that when making a claim for the recovery of a stolen object, a claimant need only make a "threshold showing" that it has "an arguable claim" to the stolen object; *the burden then shifts to the current possessor* "*to prove that the [object] was not stolen*." *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010) (emphasis added) (citing the seminal New York Court of Appeals decision *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991)); *see also Chen v. New Trend Apparel, Inc.*, 8 F. Supp. 3d 406, 455-56 (S.D.N.Y. 2014) (in both replevin and conversion claims, "[i]t is the burden of the purchaser to establish that the property was lawfully acquired" and that the "chattel was not stolen") (citing

Guggenheim, 77 N.Y.2d at 321); *Reif v. Nagy*, 61 Misc. 3d 319, 325-27 (Sup. Ct. 2018), *aff'd as modified*, 175 A.D.3d 107 (2019).

The district court failed properly to apply this well-established New York rule at trial. (SPA-12-16) The Republic more than met its *prima facie* burden proving that it had a colorable claim of ownership; indeed, it introduced more than sufficient evidence to prove outright its ownership of the Idol. More importantly, the trial court was wrong, as a matter of law, in concluding that Steinhardt sustained his burden and introduced sufficient evidence to prove that the Idol was lawfully acquired and not stolen. Steinhardt failed to present *any* evidence – let alone sufficient evidence – that the Idol was not stolen, *i.e.*, was found outside of Turkey or found and removed from Turkey before the 1906 Decree was in effect, and no reasonable fact-finder could conclude that he had. The possibility that something might have occurred is not proof that it did occur.

The district court compounded its initial error and erred in holding that, even if the Republic had established its ownership of the Idol, its claims were barred under the doctrine of laches. (SPA-16-24) To prove laches, Steinhardt and Christie's were required to prove that (1) the Republic was aware of its claim, (2) it inexcusably delayed in taking action, and 3) Steinhardt was prejudiced as a result. *See Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011). In evaluating a laches defense, the court must also examine the relative equities of the parties, balancing the

vigilance of the defendant against the diligence of the plaintiff. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 152 (1st Dep't 1990), *aff'd*, 77 N.Y.2d 311 (1991).

The district court erred in its evaluation of the Republic's diligence with respect to its initiation of a claim for the Idol. In another stark and unwarranted departure from longstanding law in New York, the district court concluded that the Republic was required to investigate whether it had a claim to the Idol merely because it learned of its *existence*. Indeed, the district court went so far as to conclude that the Republic should have brought a claim for the Idol even before it knew it owned it or that it had been stolen, and even before it had reason to believe it owned it and it had been stolen. (SPA-17-20) If sustained, such an onerous and vexatious rule would place the burden on the wronged owner to investigate provenance, rather than on the good faith purchaser where it rightfully belongs, and would foster a startlingly novel policy that runs counter to New York public policy, which favors the rights and interests of rightful owners over those of good faith purchasers. *Guggenheim*, 77 N.Y.2d at 320. Applying such a principle here would be profoundly unfair because Steinhardt was aware of the Idol's lack of provenance when he purchased it, which was long before the Republic learned that the Idol was unprovenanced.

Steinhardt also failed to establish that he suffered any prejudice because of the Republic's asserted delay, and the district court erred in finding that he did. (SPA-21-22) The law in New York is clear that where the defendant cannot show that the testimony of deceased witnesses or documents purportedly missing due to the passage of time could have established the defendant's title or right to possess the property at issue, prejudice cannot be established. *See, e.g., In re Flamenbaum,* 22 N.Y.3d 962, 966 (2013). Steinhardt's admissions also make clear that his preference for aesthetics over provenance, high tolerance for risk and utter lack of regard for patrimony laws (*see supra* pages 12-15) would have led him to ignore any warning signs, or "red flags", concerning the Idol, and he would not have changed his position even if he was faced with evidence of looting.

The district court further erred in its laches analysis in its examination of the relative equities of the parties. (SPA-23) In assessing the vigilance of the defendant good-faith purchaser, a key element is whether the purchaser was confronted with red flags at the time of the purchase that required him or her to exercise vigilance by way of inquiry to ensure that stolen property is not being purchased. *Guggenheim*, 153 A.D.2d at 152, *aff'd*, 77 N.Y.2d 311 (1991). Even a good faith purchaser like Steinhardt must exercise vigilance and conduct further inquiry when faced with the many red flags that were apparent at the time of his purchase of the Idol, and the district court committed error in finding otherwise. Its conclusion that Steinhardt

was vigilant (SPA-23) is belied by the record: Steinhardt only sought affirmation of the Idol's *value* before his purchase; he did not take any steps to investigate its pre-1960s provenance, admitting that the fact that the Idol was part of the Guennol Collection and on loan to the Met was provenance enough for him. (A-3802 at ¶18)

Finally, the district court abused its discretion in excluding indisputable "other acts" evidence proffered by the Republic, which showed Steinhardt's ongoing indifference to lawful provenance and his tolerance for risk, both of which are relevant to the vigilance and lack of prejudice elements of the laches defense. The other acts evidence, which the court dismissed as "impermissible" (SPA-5 at n.1), was both relevant and non-prejudicial, especially in the context of a bench trial. Fed. R. Evid. 401, 403. It was clearly admissible under this Court's inclusionary approach to Rule 404(b) of the Federal Rules of Evidence. *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011). The failure to admit this evidence runs counter to established case law and was an abuse of the district court's discretion.

STANDARD OF REVIEW

This Court reviews a district court's conclusions of law and mixed questions of law and fact *de novo*. *See Hartford Roman Cath. Diocesan Corp. v. Interstate Fire & Cas. Co.*, 905 F.3d 84, 88 (2d Cir. 2018). Thus, this Court reviews *de novo* a district court's "application" of its findings of fact "to draw conclusions of law." *Banker v. Nighswander, Martin & Mitchell*, 37 F.3d 866, 870 (2d Cir. 1994); *A/S*

Dampskibsselskabet Torm v. Beaumont Oil Ltd., 927 F.2d 713, 716 (2d Cir. 1991) ("the court's *use* of facts to determine that Paribas was liable for shipping costs involves conclusions of law that are subject to *de novo* review") (Emphasis in original). This Court reviews a district court's findings of fact for clear error. Fed. R. Civ. Proc. 52(a). *Banker*, 37 F.3d at 870.

This Court reviews a district court's evidentiary rulings for an abuse of discretion, including rulings on the admissibility of "other acts" evidence. *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999), *Krieger v. Gold Bond Bldg. Prod.*, 863 F.2d 1091, 1096-97 (2d Cir. 1988).

ARGUMENT

I. THE REPUBLIC MET AND INDEED EXCEEDED ITS THRESHOLD BURDEN OF ESTABLISHING OWNERSHIP OF THE IDOL

New York law is clear: in a claim for replevin or conversion of a stolen object, a claimant need only make a "threshold showing" that it has "an arguable claim" to the stolen property; the burden then shifts to the possessor to prove that the property was not stolen. *Bakalar*, 619 F.3d at 147 (citing *Guggenheim*, 77 N.Y.2d at 321). In holding that the Republic's claims for replevin and conversion of the Idol fail because it did not "satisf[y] its burden" of "show[ing] that the Idol was excavated within the boundaries modern-day Turkey sometime after 1906," the district court erred as a matter of law. (SPA-15-16)

To establish a claim for replevin, a claimant must demonstrate "a superior possessory right to property in a defendant's possession." *Reif*, 175 A.D.3d at 120, *leave to appeal dismissed*, 35 N.Y.3d 986 (2020) (internal citations removed). In an action for conversion, it must show a "possessory right or interest in the property; and [] defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Id.* A defendant-possessor of property that was stolen, even one in good-faith who purchased the property "for value," cannot obtain good title to it. *Guggenheim*, 77 N.Y.2d at 317.

A claimant's threshold *prima facie* burden is satisfied where it "present[s] sufficient evidence to *permit* the trier of fact to find for him on the issue in question." *Nw. Mut. Life Ins. Co. v. Linard*, 359 F. Supp. 1012, 1019 (S.D.N.Y. 1973) (emphasis added), *aff'd*, 498 F.2d 556, 562 (2d Cir. 1974); *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 395 (1941) (*prima facie* case established where "[s]ufficient evidence was presented to warrant a jury" finding in claimant's favor); *c.f. McCarthy v. N.Y. City Tech. Coll. of City Univ.*, 202 F.3d 161, 167 (2d Cir. 2000) (". . . on a motion for a judgment as a matter of law after a jury verdict, or on appeal after trial, the question is always whether, after drawing all reasonable inferences in favor of the nonmoving party and making all credibility assessments in his favor, there is sufficient evidence to permit a rational juror to find in his favor.") (Internal citations removed). This standard "turns on whether the evidence

can *reasonably* support a finding in plaintiff's favor." *Id.* (emphasis in original). The Republic easily met its burden here.

In its Opinion and Order on summary judgment, the district court determined that, "[g]iven that the only workshop known to have manufactured Kiliya-type idols is located in Turkey," and that the Republic's expert testified that the Idol was excavated in Turkey, a finder of fact could "conclude that the Idol was found in modern-day Turkey." (A-234-235) The district court further found that, based on the evidence presented by the Republic, a "reasonable juror could conclude that the Idol, which was in the hands of American collectors by 1961, was excavated and exported from Turkey shortly before then, while the 1906 Decree was in effect." (A-235) These findings fit well within the applicable legal standard.

But the Republic proved much more than that at trial, presenting extensive evidence that the Idol was found in modern-day Turkey and removed from its borders after 1906. Its evidence included the following unrefuted facts:

(1) the Idol was manufactured in Turkey in a workshop in Kulaksizlar, the only place where such idols were known to be manufactured (A-2677-2678 at ¶12; A-2158);

(2) there is no record – in Turkey or anywhere else – of the Idol's existence prior to its appearance in New York in 1961 (A-2685 at ¶25; A-2652 at ¶¶4-5; A-2658 at ¶12);

(3) there is no known provenance for the Idol prior to 1961, when it was purchased by the Martins from Klejman (*Id.*; A-246 at ¶5; A-1710; A-1711; A-1721; A-2627; A-2779-2780 at 35:5-37:5);

(4) Klejman is a known trafficker of looted Turkish antiquities in the 1960s (A-2682-2683 at ¶20; A-2690-2691 at ¶35; A-2654 at ¶6(d); A-2658 at ¶12; A-500 at 232:9-17; A-506-508 at 238:19-239:13, 240:4-19; A-2082);

(5) When Klejman offered the Idol to Martin, he tellingly offered him his choice from a group of several of these extremely rare idols (A-1714; A-1716; A-2658 at ¶12; A-2787-2788 at 165:17-22, 166:8-14, 167:8-11);

(6) Klejman was the source of at least two other unprovenanced Kiliya-type idols that appeared in collections in New York in the 1960s (A-2636-2637 at nos. 16-17);

(7) A handwritten annotation alongside the entry for the Idol in a collection catalogue maintained by Martin noted as early as 1990 that "Turkey may present a problem here, be careful" (A-1721);

(8) the unearthing of such a rare and exceptional object as the Idol would have caught the attention of archeologists, academics, art historians, museums and antiquities collectors throughout the world, yet there is no

known written or published reference to the Idol prior to the Martin acquisition in the 1960s (A-2685-2686 at ¶26);

(9) every known find spot of a Kiliya-type idol is within modern-day Turkey; there is no verifiable evidence that any Kiliya-type idol has been unearthed outside of Turkey's borders (A-2680-2681 at ¶¶17-19; A-1457; A-640-641 at 372:9-373:7; A-686 at 418:15-18);

(10) an internationally recognized expert on Aegean marble figurines responded to an inquiry from Christie's about Kiliya-type idols in March of 2017, asking whether she had "ever come across one that was *not* from Turkey," by stating that she has "not come across any Kilia [sic] figures that did not come from Turkey" (A-2073) (emphasis added); and

(11) in twelve well-publicized cases, antiquities looted from Turkey appeared on the market outside of Turkey shortly after they were looted (A-2652-2655 at ¶6 (*citing* A-1724-1880; A-1881-2001); A-2683-2685 at ¶¶22-25).

The Republic plainly presented "sufficient evidence" that could "reasonably support" a finding of replevin and conversion. *Linard*, 359 F. Supp. at 1019; *McCarthy*, 202 F.3d at 167. The evidence presented at trial was more than sufficient for a reasonable fact finder to find that the Idol was looted from Turkey after 1906, and indeed, that it was looted shortly before it was acquired by the Martins. The

sudden appearance of a previously unknown and completely undocumented piece of ancient art such as the Idol in the international art market, and especially as one of a group of several, is an indisputable sign that the object was likely looted. (A-2658 at ¶12) The Republic not only met its *prima facie* "threshold showing" – the Republic exceeded it. *See Bakalar*, 819 F. Supp. 2d at 295 (the fact that an art collector had owned other Egon Schiele drawings that were also eventually sold by his sister-in-law in 1956 was sufficient evidence of his possession prior to World War II of the drawing at issue); *see also Reif*, 175 A.D.3d at 124-25 (the defendants' argument that the claimant "did not 'conclusively' prove' ownership" was rejected by the court, which noted that "conclusive proof is not required to shift the burden to defendants"); *Flamenbaum*, 27 Misc. 3d 1090, 1095-96 (Sur. 2010), *rev'd on other grounds*, 95 A.D.3d 1318 (2d Dep't 2012), *aff'd*, 22 N.Y.3d 962 (2013) (proof of the claimant's "control of the tablet" for nineteen years prior to its disappearance in 1945 after its excavation was sufficient for the court to hold that the claimant met its initial burden of proof).

Having proved its *prima facie* case that the Idol was removed from Turkey after 1906, the Republic met its threshold showing that it owned the Idol; under *Guggenheim*, the burden shifted to Steinhardt and Christie's to prove that *this* Idol was not stolen.

II. APPELLEES FAILED TO REBUT THE REPUBLIC'S PROOF OF OWNERSHIP OF THE IDOL

A. Steinhardt Did Not Present Any Evidence Establishing That the Idol Was Not Stolen

Under controlling New York law, once the Republic met its "threshold showing" that it has "an arguable claim" to the Idol, which it did here, the burden then shifted to Steinhardt to prove that *this* Idol "was not stolen property." *Bakalar*, 619 F.3d at 147 (*citing Guggenheim*, 77 N.Y.2d at 321). Steinhardt could have met his burden of proving that the Idol was lawfully acquired and not stolen, for example, by producing evidence of lawful provenance, a bill of sale for the Idol before 1906, a record of its private ownership in Turkey prior to 1906 or a record of its lawful excavation outside of Turkey. Steinhardt failed to do any of that.

Instead, he offered nothing more than conjecture concerning Kiliya-type idols generally, arguing principally that such *an* idol – not the Idol in this case – conceivably could have left Turkey before 1906. Speculation about what is conceivable, however, is not a substitute for hard evidentiary facts. For example, at trial, Steinhardt's proffered expert, Dr. Maxwell Anderson ("Anderson"), was asked what evidence he had uncovered that "demonstrates…that the Idol in this case was found outside of Turkey." (A-1134 at 866:3-5) In response, Anderson conceded that he had no "evidence of where it was found," and instead offered an "observation"

that "there was active trade in the Aegean by the Fifth Millennium BC," so he "assume[d]" that "it traveled widely *as a type*. . ." *Id.* at 866:6-14 (emphasis added).

Anderson is not an archeologist; he is an art historian. (A-3808 at ¶5; A-1174-1177 at 906:5-19, 907:15-18, 908:19-21, 909:7-15) His career was spent primarily as a museum director and curator, and his area of specialization is in classical Greek and Roman Art, not ancient Mid-Eastern Art. *Id.* Indeed, Anderson has testified that he does not consider himself an expert in "Chalcolithic idols," including Kiliya-type idols. (A-1101 at 833:19-22)

But even assuming that Anderson was qualified to offer these opinions, there is no factual support anywhere in the record for any of his sweeping generalizations about ancient commerce, particularly for his "observation" that there was "active trade" in the Aegean in the fifth century B.C. (A-1134 at 866:3-14) Moreover, even if there were factual support for Anderson's overly broad assumptions about ancient marine trade, the fact that there may have been "active trade" somewhere in the Aegean in early antiquity does not mean that that there was active trading throughout the Aegean, or that "active trade" included trade in non-utilitarian Kiliya-type idols. (A-2677-2679 at ¶¶12-15; A-681-683 at 413:23-414:13, 414:21-415:25; A-685-686 at 417:9-418:3; A-699-700 at 431:6-14, 431:23-432:2; A-2873-2874 at 93:18-94:22; A-2894 at 16:14-22)

No Kiliya-type idol has ever been excavated on one of the Aegean islands outside of Anatolia. (A-2680-2682 at ¶¶17-19; A-1457; A-640-641 at 372:9-373:7; A-686 at 418:15-18) Moreover, even if there was evidence that Kiliya-type idols had been the object of ancient maritime commerce, there is no evidence that the Idol in this case had been traded in antiquity outside of Anatolia. Anderson's conjecture is not a substitute for evidence and is not proof that the Idol at issue in this case is not stolen property. *See Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 578 (1951) ("Speculation cannot supply the place of proof.").

Anderson provided additional "expert" opinions on matters for which his knowledge, skill, experience, training, and education are marginal at best. Fed. R. Evid. 702. In one example, Anderson opined that Greek tools from one of the Aegean islands dating to the Paleolithic era that were found in Kulaksizlar somehow are evidence that Kiliya-type idols were widely distributed in antiquity throughout the Aegean (A-3819 at ¶34(c)), despite the contradictory corresponding fact that no Kiliya-type idol has ever been unearthed outside of modern Turkey, including the island where the Paleolithic era tools supposedly originated. (A-2680-2682 at ¶¶17-19; A-1457; A-640-641 at 372:9-373:7; A-686 at 418:15-18) More remarkably, Anderson failed to mention that the Paleolithic era ended *5,000 years* before the Chalcolithic era when the idols were manufactured, or to explain how the presence of such tools found in Kulaksizlar 6,000 years after the idols were manufactured is

even relevant to his claim that idols were exported – again, especially since no idols have ever been unearthed outside of Turkey. (*Id.*; A-682 at 414:5-13)

Anderson also testified that no intact Kiliya-type idol has been excavated at Kulaksizlar, the only known manufacturing site of Kiliya-type idols, and that therefore, Kiliya idols must have been "traded after they were made." (A-3813-3814 at ¶22) As an initial matter trade, especially in antiquity, does not mean marine trade. Anderson's testimony also conspicuously fails to mention the many years of widespread looting and agricultural activity at Kulaksizlar (A-2878 at 166:15-22; A-3692; A-2023), to say nothing about local exchange, all of which would explain the absence of intact idols at the site of their manufacture, thus effectively refuting Anderson's too-facile conclusion regarding foreign trade.

In all events, relying on mere conjecture and the opinions of a purported expert whose testimony concerned only Kiliya-type idols generally, Steinhardt failed to present any affirmative proof demonstrating the Idol's lawful provenance*, e.g.,* that it was excavated outside of Turkey, was excavated in Turkey before 1906 or was otherwise not stolen property. He thus failed to satisfy the heavy burden imposed on him under New York law to prove that the Idol was not stolen. *Bakalar*, 819 F. Supp. 2d at 299 (possessor could not meet his burden of proof where evidence was insufficiently conclusive); *Garlick v. Meyers*, 35 Misc. 805, 805 (App. Term 1901) ("The defendant offered no evidence to show how he came into possession of the

coach, or what claim of right, if any, he had to its possession . . . If he had any right to its possession, he should have made the fact to appear.").

B. The District Court Erred in Finding Facts That Are Not Supported or Are Contradicted by the Record

The district court erred in accepting certain "facts" as true that are clearly not supported or that are contradicted by the record. Such findings should be set aside by this Court. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

First, the district court concluded that "trade and travel during [the Chalcolithic] period could have reached the Aegean." (SPA-13) In support of its conclusion, the court accepted Anderson's testimony that Kiliya-type idols have been "found" outside of Turkey. *Id.* But this "fact" is plainly contradicted by the record; there is no verifiable evidence that *any* Kiliya-type idol (including the Kiliya-type idol displayed today in the Mytilene Museum on Lesbos) has ever been unearthed outside of what is now modern Turkey (A-2680-2682 at ¶¶17-19; A-1457; A-640-641 at 372:9-373:7; A-686 at 418:15-18; A-2286; A-2325; A-1117 at 849:21-24), and Steinhardt offered no evidence to the contrary.

Second, the district court also concluded that "there are at least two" Kiliya-type idols that existed "outside of Anatolia prior to 1906" (SPA-14) – one currently

in the collection of the Mytilene Museum in Lesbos (the "Mytilene idol") and the second in the collection of the American School of Classical Studies ("ASCS") in Athens (the "ASCS idol"). Based on this finding, the district court concluded that idols were transported "in the 19th and early 20th centuries," and therefore the court could not infer "that the Idol was found in modern-day Turkey." *Id.*

The mere fact that two Kiliya type idols are presently located outside of Turkey does not mean that the Idol could not have been "found" in modern day Turkey; plainly, it could have been. The fact that these objects hypothetically could have been transported in the 19th and early 20th centuries does not mean that they were. In fact, there is no evidentiary support in the record that they were.

According to research conducted by the International Head of Antiquities at Christie's (A-147 ¶1; A-154 at ¶26), the Mytilene idol has the following provenance: "Grimani Collection, Venice, before 1927, likely before 1865 (the year Giovanni Grimani died and the collection began being dispersed). Likely acquired in W. Anatolia." (A-2632-2633 at no. 4) When asked about this provenance at trial, Anderson testified that the "source of this information" was "an assumption or some form of guesswork," and that he did not "recall the article being dispositive." Anderson concluded that he had no reason to "accept or dispute" that the idol was excavated sometime before 1865 – he did not, as the district court found, testify that "the [i]dol was likely acquired before 1865." (A-1167-1168 at 899:8-900:14) The

district court nonetheless relied on this testimony as a basis for establishing this "fact."

With respect to the second Kiliya-type idol that purportedly existed "outside of Anatolia prior to 1906," the district court found that the ASCS idol was "first published in 1902 and is today in Athens," suggesting that the idol was with the ASCS in 1902. (SPA-14) But there is no evidence that this idol had been gifted to the ASCS at the time of its publication in *Katalog der Sammlung Calvert in den Dardanellen und Thymbra, im Auftrag des Kais, Deutschen Archaologischen Institutes hergestellt von H. Thiersch im Sommer 1902* – indeed, the publication referenced by the court is a catalogue of the collection of Frank Calvert, *not* of the ASCS. (A-2632 at no. 1) Thus, it is just as likely that this idol was gifted at a later date, including after 1906 (*i.e.* merely four years after the publication). Without more information about the provenance of both of these idols, the significance of their present location is meaningless. In any event, there is no basis in the record for the district court's conclusion that the ASCS idol was "known to have existed outside of Anatolia prior to 1906." (SPA-14)

The district court further erred in finding that, "of the two [i]dols that are known to have been excavated prior to 1906, neither generated significant attention among scholars or collectors of antiquities." (SPA-15) This conclusion is also belied by the record. Both idols were clearly recorded in the literature, as noted in

Anderson's trial testimony and in Christie's research summary. (A-3816-3817 at ¶31; A-2632-2633 at nos. 1, 4) The fact that the precise excavation date of the Mytilene idol or the exact export date of the ASCS idol is unknown does not change this unalterable fact. In contrast, there is no reference to the Idol whatsoever prior to the 1960s. (A-2685-2686 at ¶26; A-2703-2704 at ¶60)

In any case, whether the Mytilene idol or the ASCS idol left Turkey's borders before 1906 does not prove that the Idol in this case was exported from Turkey before 1906. Steinhardt did not provide any proof that the Idol was excavated and removed from Turkey before 1906, or that it was excavated outside of Turkey. Speculation and hypothesis cannot be Steinhardt's salvation – especially in view of the lack of supporting evidentiary facts. This evidentiary void stands in stark contrast to the compelling and unrefuted evidence presented by the Republic that the Idol was excavated in Turkey and removed shortly thereafter.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT LACHES BARS THE REPUBLIC'S CLAIMS

A. The Republic Was Not Required to Investigate Whether It Had a Claim Before It Knew, or Should Have Known, the Idol Belonged to It

The district court found that the Republic was aware or should have been aware of the existence of the Idol and concluded that the Republic had "a duty [] to inquire further or to risk facing a laches defense…" (SPA-19) Finding that the Republic "inexcusably delayed in taking action," the district court concluded that

the Republic was barred from recovering its claimed property by the equitable doctrine of laches. (SPA-20) But there is no requirement under New York law that a potential claimant who learns of the existence of an object must investigate whether that object belongs to it and has been stolen, or risk being barred from recovering its stolen property. Indeed, New York courts flatly have refused to adopt such a rule as contrary to New York public policy, which expressly favors the interests of *bona fide* owners over those of good faith purchasers.

It is black-letter law that "[i]n order [sic] prove laches, [the possessor] must show that: (1) [the claimants] were aware of their claim, (2) they inexcusably delayed in taking action; and (3) [the possessor] was prejudiced as a result." *Bakalar*, 819 F. Supp. 2d at 303 (citations omitted). Since laches is an equitable defense, the "conduct of both [parties]" will also be "relevant to any consideration of this defense" (*Guggenheim*, 77 N.Y.2d at 321); thus, Steinhardt's vigilance when acquiring the Idol must be weighed against the Republic's diligence in commencing this action (*Guggenheim*, 153 A.D.2d at 152, cited in *Bakalar v. Vavra*, 500 F. App'x 6, 9 (2d Cir. 2012)). As demonstrated below, as a matter of law, Steinhardt failed to satisfy any of the elements of a laches defense under New York law.

The district court improperly added an additional element to the laches analysis mandated by New York courts. According to the district court, a claimant, here a foreign sovereign, must take specific steps to investigate diligently whether

an antiquity belongs to it *and* whether that antiquity is stolen property under its cultural patrimony laws. To require a source country like Turkey, with its vast trove of unknown ancient artifacts, to investigate whether a previously unknown artifact is looted patrimony places an impossible burden on it. (A-652-654 at 384:7-386:16; A-2700-2703 at ¶¶54-59; A-1130-1131 at 862:22-863:13) Such an onerous requirement would insulate looted art found in New York from recovery by its lawful owner and make New York a haven for looted and stolen artwork – a result that New York courts have eschewed as contrary to the State's public policy, which has long favored protecting the rights and interests of rightful owners over those of good faith purchasers. *See Guggenheim*, 77 N.Y.2d at 317-320; *Sotheby's, Inc. v. Shene*, No. 04 CIV 10067 (TPG), 2009 WL 762697, at *2 (S.D.N.Y. Mar. 23, 2009) ("[] New York law gives greater protection to an object's true owner than to its good-faith purchaser, because doing otherwise would 'encourage illicit trafficking in stolen art.'") (citing *Guggenheim*, 77 N.Y.2d at 320); *Flamenbaum*, 22 N.Y.3d at 966 ("[t]o place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would ... encourage illicit trafficking in stolen art") (citing *Guggenheim*, 77 N.Y.2d at 320) (internal citations removed).

The mere fact the Republic became aware of the Idol's *existence* or of its Anatolian origins did not provide the Republic with knowledge that it owned or had

a claim to recover it. Before Christie's 2017 Auction for the sale of the Idol, the Republic was neither aware, nor should it have been aware, that it had a claim to the Idol. The provenance published in the Christie's catalogue is not only the first known written provenance for the Idol, it is the first known publicly published provenance for the Idol. (A-2652 at ¶¶4-5; A-2703-2704 at ¶60; *see also* A-1083 at 815:18-815:24) It was only at the time of the Auction, when the Republic learned that the Idol lacked any provenance prior to the 1960s, that it had reason to know that the Idol had been illicitly excavated and, having knowledge of that crucial fact, it promptly took action to make a claim for it. (A-2652-2658 at ¶¶4-11; A-253-254 at ¶¶71-72) When the Republic later discovered that Klejman had sold the Idol to Martin, and that Klejman had offered Martin one or more of these rare objects from a "group" of "several", it left no doubt that the Idol was recently looted from Turkey. (A-1714; A-1716; A-1721; A-2658 at ¶12; A-2787-2788 at 165:17-22, 166:8-14, 167:8-11)

Guggenheim, the seminal New York case involving the assertion of the laches defense in art recovery cases, is directly on point and provides the appropriate analytical framework for assessing the propriety of the defense in this case. In *Guggenheim,* a gouache had been stolen from the Guggenheim Museum and the defendant possessor argued that the museum should have been searching for the artwork from the time it was thought to be missing, but before it had any reason to

believe it had been stolen. The Appellate Division held that only after the museum conducted a full-scale inventory and determined that the gouache was actually missing could it have presumed that the gouache must have been stolen. The court explained that "it simply makes no sense" to require that the museum conduct "a search that [it] then had no reason to undertake." *Guggenheim*, 153 A.D.2d at 151-52. Similarly, here the Republic may have known of the Idol's Anatolian origins, but it had no reason to believe that the Idol had been looted until it learned that it had no history of prior ownership before the 1960s when it was sold to Martin – a clear and unambiguous indication that it had been illegally excavated and removed from Turkey. (A-2652 at ¶¶4-5; A-2658 at ¶12)

Indeed, no New York case has ever required that an owner, especially one who is unaware of its ownership interest, search for an artwork before it knows that it was stolen. Thus, for example, the ownership claim to the drawing at issue in *Bakalar* was based on the disappearance during the Nazi era of an inventoried collection that included the drawing. 819 F. Supp. 2d at 303; *see also Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 193 (2d Cir. 2019) (claim made after owners *knew* to whom an identified painting was sold under duress); *Sanchez v. Trustees of the Univ. of Penn.*, No. 04 Civ. 1253, 2005 WL 94847 (S.D.N.Y. Jan. 18, 2004) (pre-Columbian gold objects *known* to have been stolen from identified collection); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, 300 A.D.2d

117, 118 (1st Dep't 2002) (painting was *known* by owner to have been stolen); *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98 Civ. 7664, 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999) (palimpsest *known* to have been missing from identified collection).

To require otherwise, as the district court did here, would take the diligence on the part of the wronged original owner required under New York law well beyond *Guggenheim.* This is not a case of an inventoried work of art that disappears from a collection so that the loss is noticed immediately by its acknowledged owner and the owner is required to pursue its claim against the defendant-possessor. Indeed, here the opposite is true: the Republic had no knowledge of the Idol's existence at the time of its loss and – even after learning of its existence and its Anatolian origins at some later point – for decades thereafter had no knowledge that the Idol had been looted or stolen and that it had a claim to rightful ownership. It was not until it learned that the Idol lacked any provenance prior to the 1960s with the publication of the Christie's catalogue that it had sufficient information to know of its claim. (A-2703-2706 at ¶¶60-65; A-2652-2658 at ¶¶4-11) Before the publication of the Auction catalogue, "it simply ma[de] no sense" for the Republic to "search" for the Idol; and it is unreasonable to require otherwise. *Guggenheim*, 153 A.D.2d at 151-52. It therefore did not "inexcusably delay[]" in asserting its claim, as the district court erroneously held. (SPA-20)

B. Steinhardt Did Not Suffer Any Prejudice

The district court also erred in concluding that Steinhardt was prejudiced as a result of the Republic's alleged delay in asserting its claim for the Idol. Steinhardt failed to show that Alastair Martin's testimony, or that of any of the other deceased witnesses, would have established that the Republic did not own the Idol. *See Flamenbaum*, 22 N.Y.3d at 966; *Reif*, 175 A.D.3d at 131; *Abbott Labs. v. Feinberg*, 506 F. Supp. 3d 185, 200 (S.D.N.Y. 2020); *see also Mason v. Jamie Music Pub. Co.*, 658 F. Supp. 2d 571, 588 (S.D.N.Y. 2009) (rejecting laches defense and claim of prejudice based on inability to present deceased witness's testimony where "testimony would not change the Court's decision"). To the contrary, had he inquired of Martin, Martin presumably would have expressed the same concerns that were noted in the handwritten notations in his catalogue. (A-1721) Before he acquired the Idol, Steinhardt knew the Idol lacked provenance and could have asked witnesses like Martin and Klejman, both of whom were still living, about the provenance of the Idol but conspicuously failed to do so. Had he contacted Martin directly, he also would have learned that Martin purchased the Idol from Klejman, a known dealer in looted antiquities in the 1960s (A-2682-2683 at ¶20; A-2690-2691 at ¶35; A-2654 at ¶6(d); A-2658 at ¶12; A-500 at 232:9-17; A-506-508 at 238:19-239:13, 240:4-19; A-2082), and that the Idol was unprovenanced at that time. Having deliberately failed to take this prudent action before he purchased the Idol,

Steinhardt cannot now say that he somehow was subsequently prejudiced by the unavailability of these witnesses at trial.

In addition, Steinhardt's repeated sworn admissions that he is willing to take the risk that objects he purchased might be the subject of claims by foreign sovereigns and that he favors aesthetics over the provenance of antiquities (A-875 at 607:1-8; A-939-942 at 671:4-674:5; A-944-945 at 676:5-11, 677:7-14; A-2804-2806 at 44:14-46:13, 46:14-47:19, 51:3-52:2) demonstrate that he would have taken his chances and purchased the Idol, even if he had known that it was looted from Turkey. His actions, as we demonstrate further below, reflect the same indifference to lawful provenance. Thus, even if it could be established that the Republic unreasonably delayed in bringing its claim, Steinhardt failed to establish the third prong of the laches defense – that he suffered any prejudice as a result.

C. The Balancing of the Equities Test Tips in Favor of the Republic

It is well-settled in New York that in evaluating the defense of laches, the "reasonableness of both parties must be considered and weighed." *Guggenheim*, 153 A.D.2d at 152, *aff'd*, 77 N.Y.2d 311 (1991) This is because "defendant's vigilance is as much in issue as plaintiff's diligence" – *even when the defendant is a good faith purchaser* (as the defendant-Lubell was in *Guggenheim*). *Id.* The Appellate Division in *Guggenheim* specifically noted that in formulating the balancing test, it was expressly commenting on the plaintiff's argument that it was

the defendant's "failure to investigate obvious red flags," and "not [plaintiff's] own ostensible lack of diligence, that led to defendant's purchase of the gouache" at issue there. *Guggenheim*, 153 A.D.2d at 152. The New York Court of Appeals affirmed the order of the Appellate Division, noting that "the conduct of both the appellant and the museum [appellee] will be relevant to any consideration of this defense at the trial level. . ." *Guggenheim*, 77 N.Y.2d at 321.

The *Guggenheim* balancing test has stood the test of time. It has been consistently applied by both New York state and federal courts. *See, e.g., Flamenbaum*, 95 A.D.3d 1318 (2d Dep't 2012), *aff'd*, 22 N.Y.3d 962 (2013); *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532 (S.D.N.Y. April 12, 2002). Nonetheless, the district court determined that Steinhardt's status as "an ordinary purchaser" in good faith relieved him of any "duty to investigate" the provenance of the Idol, even in the presence of red flags. (SPA-23) This conclusion is contrary to the rule in *Guggenheim* and erroneous as a matter of law.

Indeed, *Guggenheim* made clear that the failure to investigate red flags does not undermine the good faith of the purchaser and is not the equivalent of bad faith. The plaintiff in *Guggenheim* did not assert that the defendant knew or should have known based on the presence of red flags that the plaintiff had a claim – and similarly, such assertion was not made by the Republic concerning Steinhardt. Rather, those red flags had to be examined in order to determine whether it was the

alleged delay on the part of the claimant, or the purchaser's own lack of vigilance, that led to his or her acquisition. *Guggenheim*, 153 A.D.2d at 152. Thus, it was asserted by the claimant in *Guggenheim* that the "bill of sale transferring the gouache to defendant … 'raised bright red flags' that would have caused a prudent purchaser to suspect the provenance of the gouache…[and to] make inquiry of the plaintiff"; and it was this assertion that led the court to adopt a balancing of the equities test. *Id.*

The same is true here. Numerous red flags should have prompted further diligence and investigation by Steinhardt at the time of his purchase of the Idol – red flags that the district court was manifestly wrong to disregard. These included, most conspicuously, the Idol's tell-tale non-existent provenance prior to the 1960s despite being a 6,000-year-old artifact. (A-2652 at ¶¶4-5; A-2658 at ¶12) Additionally, Steinhardt acquired the Idol knowing that the Met, at the same time, was repatriating a trove of other stolen Turkish antiquities. (A-1202 at 934:18-23; A-2693-2694 at ¶38; A-2514 at 49:3-10) The presence of such red flags should have prompted further vigilance from Steinhardt. *Guggenheim*, 153 A.D.2d at 152, *aff'd*, 77 N.Y.2d at 321. But Steinhardt ignored all of these warnings.

Moreover, even if it were not so clear that a good faith purchaser has a duty to investigate the provenance of an object in the presence of red flags, Steinhardt nevertheless had an independent duty of inquiry when acquiring the Idol.

Steinhardt, with his vast knowledge and experience in collecting and selling antiquities, should be considered a merchant under the "broad language" of New York's Uniform Commercial Code ("UCC"). *Pecker Iron Works, Inc. v. Sturdy Concrete Co.*, 96 Misc. 2d 998, 1002 (Civ. Ct. 1978); *R.F. Cunningham & Co. v. Driscoll*, 7 Misc. 3d 234, 236 (City Ct. 2005) ("[] New York … has adopted the more liberal interpretation of UCC 2–104 as set forth in the official comment. . .").

Pursuant to the UCC, a "merchant" is defined as a person "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction…" N.Y. U.C.C. Law § 2-104(1) (McKinney 2021); *see Deweldon, Ltd. v. McKean*, 125 F.3d 24, 27-28 (1st Cir. 1997) (sculptor/art collector found to be a merchant under the UCC because of his "knowledge and skill peculiar to art and the art trade").

In this case, Steinhardt started buying and selling antiquities in the late 1980s and, according to his testimony, amassed a collection of several hundred objects from galleries, dealers and auction houses, with art and antiquities comprising 60% of his total assets. (A-2798 at 14:23-15:20; A-2800-2801 at 28:3-5, 29:11-30:11, 31:13-16; A-2803-2805 at 37:12-17, 39:25-40:8, 40:09-41:06, 43:7-11, 49:9-19; A-2807 at 57:6-18; A-2824 at 152:21-153:6; A-3799 at ¶6)

Steinhardt's antiquities buying was far from casual. As far back as 1993, Steinhardt maintained records of his antiquities acquisitions and sales. (A-905-906

at 637:23-638:17) Steinhardt also employed someone to be in charge of recording objects that he bought and sold. *Id.* Such records included inventories of Steinhardt's antiquities collection, and suggest that, by 1993, Steinhardt had acquired approximately 150 antiquities. (*Id.*; A-2592-2609; A-2612-2621)

Steinhardt, as a sophisticated collector with immense knowledge and decades of experience in acquiring and selling antiquities, should be held to the higher degree of inquiry applicable to merchants. N.Y. U.C.C. Law § 2-103(b) (McKinney 2021) ("'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."); *cf., e.g., Brown v. Mitchell-Innes & Nash, Inc.*, No. 06 Civ. 7871 (PAC), 2009 WL 1108526 (S.D.N.Y. April 24, 2009). Such heightened inquiry "cannot be interpreted to permit… indifference as to the 'provenance'" of an art object. *Porter v. Wertz*, 68 A.D.2d 141, 146 (1979), *aff'd on other grounds*, 53 N.Y.2d 696 (1981).

Nonetheless, Steinhardt exhibited flagrant "indifference as to the provenance" (*id.*) of the Idol. His alleged vigilance – which was required regardless of whether he acted as a merchant or a good faith purchaser who purchased the Idol in the presence of red flags – extended no further than talking about the Idol to the Merrin Gallery, from whom he acquired the Idol, and some friends and people he knew at the Met. (A-3800-3802 at ¶¶12, 14-16; A-916-919 at 648:3-10, 648:21-649:4, 650:15-651:4; A-928-930 at 660:9-661:5, 662:2-16) Significantly, none of these

contacts could provide him with information about the Idol's conspicuously abbreviated provenance. In his direct testimony declaration, Steinhardt testified that the Martins' ownership and the Met's possession of the Idol on loan were enough provenance for him. (A-3802 at ¶18) Steinhardt did not even attempt to contact Turkey or Martin, whom he knew, or Klejman who was still living at the time. (A-916-917 at 648:3-10, 648:21-649:1); *c.f. Guggenheim*, 77 N.Y.2d at 321 (noting that the Lubells investigated the provenance of the gouache before purchasing it "by contacting the artist and his son-in-law directly").

Had Steinhardt contacted Martin, Martin could have informed Steinhardt of the circumstances of his purchase – that he had purchased the Idol from Klejman, who had offered him a group of these extremely rare Kiliya-type idols for sale at the same time (A-1714; A-1716; A-2658 at ¶12) and who had sold the Lydian Hoard to the Met (A-2682-2683 at ¶20; A-2690-2692 at ¶¶35-36; A-2695-2696 at ¶43; A-2654 at ¶6(d)). Perhaps he would have shared his own concerns about Turkey claiming the Idol as cultural patrimony, as noted in his annotated catalogue. (*See* A-1721, stating in an annotation alongside the entry for the Kiliya Idol: "1990 Turkey may present a problem here, be careful.") Instead, Steinhardt, knowing that the Idol was unprovenanced, probed no further and chose simply to affirm the Idol's value with no effort to inquire into its provenance prior to the 1960s. Under the circumstances, the district court was clearly erroneous in concluding that Steinhardt

was vigilant in acquiring the Idol and that his indifference to lawful patrimony did not contribute to his decision to purchase it.

D. Evidence of Steinhardt's "Other Acts" is Relevant and Admissible to Prove Steinhardt's Indifference to Lawful Provenance

Under the Federal Rules of Evidence ("FRE") and firmly established case law, evidence of other acts is admissible if "it is relevant to an issue at trial other than the defendant's character, and if its probative value is not substantially outweighed by the risk of unfair prejudice." *United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000) (citing *Livoti*, 196 F.3d at 326); *United States v. Williams*, 577 F.2d 188, 192 (2d Cir. 1978). This line of proof regarding Steinhardt's long history in dealing with unprovenanced antiquities readily satisfies each of these criteria for admitting other acts evidence – it evidenced an ongoing indifference to provenance when he purchased the Idol, which corroborated his admissions to that effect.

Nonetheless, the district court excluded this highly relevant "other acts" evidence proffered by the Republic from its laches analysis, finding it to be "impermissible under Rule 401, Rule 403, and Rule 404(b)." (SPA-5 at n.1) The court compounded that initial error by also disregarding Steinhardt's damaging admissions concerning the unprovenanced origins of antiquities he acquired, which further demonstrate that he has understood, from his earliest days as a collector, the risks of acquiring, and ultimately forfeiting looted antiquities. (*See supra* pages 12-15) As Steinhardt testified, dealers in the market and the market itself had a "taint"

over it. (A-2807 at 55:8-56:7) Steinhardt nonetheless continued heedlessly to acquire antiquities, including those that were "fresh from the ground," knowing that there could be claims by foreign governments, because he bought antiquities for "aesthetic" reasons and was prepared to assume the risk that a foreign sovereign might make an adverse claim for the piece (A-875 at 607:1-8; A-939-942 at 671:4-674:5; A-944 at 676:5-11; A-945 at 677:7-14; A-2804-2806 at 44:14-46:13; 46:14-47:19, 51:3-52:2) And, despite testifying in 1996 that he became aware of the "patrimony issue" in the "period of the nineties" and that it was "a topic that became quite a focus for anybody who was involved in the collecting of ancient art" (A-2510-2512 at 43:14-45:22) – testimony he swore he no longer recalled and indeed contradicted in his testimony in this case (A-895-897 at 627:12-629:10; A-899-901 at 631:25-633:15; A-903 at 635:8-17) – he also testified at his deposition in this case that he believed foreign patrimony laws should not be applicable in the United States or to private collectors (A-2812-17 at 103:16-106:18, 107:25-109:19, 110:4-12, 112:8-114:3, 115:3-19, 116:2-8, 117:3-118:3, 118:24-119:11; A-2827-2829 at 245:9-13, 245:25-246:14, 247:17-23, 318:21-320:19).

All of these statements are indisputably relevant as they explain how and why Steinhardt took – or failed to take – available cautionary steps in acquiring the Idol and his lack of vigilance in doing so. Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without

the evidence; and (b) the fact is of consequence in determining the action."); *see Guggenheim*, 153 A.D.2d at 152, *aff'd*, 77 N.Y.2d 311 (1991). Likewise, the dozens of antiquities that were known to have been seized from Steinhardt's collection as of the time of the trial – several of which were repatriated to foreign States following claims that the antiquities were taken in violation of the cultural patrimony laws of those States[2] – further illustrate and corroborate Steinhardt's admitted general indifference to foreign patrimony laws.

The proffered other acts evidence was incontrovertible and probative of Steinhardt's consistent refusal to conduct appropriate investigations into unprovenanced antiquities prior to purchasing them. (*See supra* pages 12-15) And, at least as of the time of his deposition in this case, that Steinhardt persisted in his claim that foreign patrimony laws should simply not apply to individual collectors like himself in the U.S. (A-2813 at 105:7-105:24)

Pursuant to FRE 402, "[r]elevant evidence is admissible" except as otherwise provided. Fed. R. Evid. 402. The evidence at issue is not excluded by the U.S. Constitution, or any federal statute, and is not precluded by the rules of evidence. *Id.* Pursuant to FRE 403, "[t]he court *may* exclude relevant evidence if its probative value is *substantially outweighed*" by one of several enumerated "danger[s]." Fed.

[2] Evidence of these facts was proffered to the district court (*see* A-255-257) but was erroneously excluded (A-258-268).

R. Evid. 403 (emphasis added). These are: "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

In this case, especially because the trial below was a bench trial, there was no risk of "misleading the jury" or of spillover of "unfair prejudice" or danger of "confusing the issues" under FRE 403. Fed. R. Evid. 403. It cannot be "unfair" to admit highly probative evidence of how Steinhardt has approached other acquisitions and handled the assumption of the "risk" in transactions that are all but identical to the one involved in this case. Furthermore, the presentation of evidence concerning the seizure and forfeiture of antiquities from Steinhardt's collection would not have wasted any time – it would have been simple and straightforward: publicly available documents, orders of forfeiture and/or search warrants, returns and inventories related to those warrants, and relevant portions of deposition testimony. (*See* A-255-257)

In applying FRE 404(b), this Court "follows the 'inclusionary' approach, which admits all 'other act' evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402." *Curley*, 639 F.3d at 56. The categories listed in FRE 404(b) regarding permissive use of similar acts evidence is not exhaustive, but

merely illustrative of appropriate non-propensity uses. *United States v. Speed*, 272 F. App'x 88, 91-92 (2d Cir. 2008).

The proffered "other acts" evidence is admissible here under the inclusionary form of the rule as it was not offered as proof of Steinhardt's character, but to show that his acquisition of the Idol was part of a routine practice that focused on the object itself rather than its provenance. *C.f.* Fed. R. Evid. 406, Advisory Committee Notes (recognizing a "trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation"). Steinhardt employed an overall acquisition strategy by which he deliberately failed time and again to take even minimal steps, despite the presence of red flags, to ensure that he was acquiring good title when purchasing other antiquities.

Such calculated indifference runs afoul of *Guggenheim*'s clear rule requiring a good-faith purchaser to be vigilant. *Guggenheim*, 153 A.D.2d at 152, *aff'd*, 77 N.Y.2d at 321. The district court abused its discretion in finding this highly probative line of proof "impermissible" and excluding it from evidence at trial. (SPA-5 at n.5)

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate the district court's Judgment dated September 7, 2021 and remand the matter

to the district court with direction that judgment be entered declaring that all right, title and interest in and to the Idol is vested in Turkey.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). The brief contains 13,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated: January 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I electronically filed the foregoing Opening Brief of Appellant the Republic of Turkey with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Republic of Turkey,

Plaintiff,

–v–

Christie's, Inc.,

Defendant,

Michael Steinhardt,

Defendant-Counterclaimant,

Anatolian Marble Female Idol of Kiliya Type,

Defendant-in-rem.

17-cv-3086 (AJN)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

ALISON J. NATHAN, District Judge:

The Republic of Turkey brings this case against Christie's and Michael Steinhardt, as well as the Idol—Defendant-in-rem Anatolian Marble Female Idol of Kiliya Type. This diversity action arises from the alleged unlawful excavation and smuggling out of Turkey of the Idol, a millennia-old cultural artifact that Turkey claims it owns pursuant to its patrimony law. The Idol ultimately made its way into the hands of Steinhardt, a private collector in the United States. The Second Amended Complaint alleges New York state law claims of conversion and replevin and seeks a declaratory judgment that all right, title, and interest in and to the Idol is vested in Turkey. Dkt. No. 65. Christie's and Steinhardt counterclaimed, alleging New York state law claims of tortious interference with contract, or, in the alternative, tortious interference with prospective economic advantage, and they seek a declaratory judgment that all right, title,

and interest in and to the Idol is vested in Steinhardt. Dkt. No. 122. On September 30, 2019, the Court granted Turkey's motion for summary judgment on the Defendants' claims of tortious interference with contract and tortious interference with prospective economic advantage claims. *Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204, 218 (S.D.N.Y. 2019). Turkey's claims of conversion and replevin, and the parties' respective claims for a declaratory judgment, remained. Both sides' claims boil down to the question of who owns the Idol.

In April 2021, the Court conducted an eight-day bench trial on these claims. This Opinion and Order constitutes the Court's findings of fact and conclusions of law for purposes of Federal Rules of Civil Procedure 52(a)(2) and 65. To the extent any statement labeled as a finding of fact is a conclusion of law it shall be deemed a conclusion of law, and vice versa.

In sum, the Court finds and concludes that Turkey did not meet its burden of proof in establishing ownership of the Idol. Although the Idol was undoubtedly manufactured in what is now modern-day Turkey, the Court cannot conclude based on the trial record that it was excavated from Turkey after 1906, both prerequisites to a finding of ownership under the relevant law. The Court also finds and concludes that even if Turkey had established ownership, the trial record readily establishes that Turkey slept on its rights, which bars recovery under the doctrine of laches.

FINDINGS OF FACT

I. Origins of the Idol

The Idol was likely manufactured in the middle or late 5th millennium B.C.E., between 4800 and 4100 B.C.E, in Kulaksizlar, which is located in modern-day Turkey's Manisa Province in the region of Anatolia. Tr. 428:21–429:21 (Brodie); 832:24–834:2 (Anderson). The Idol belongs to the Kiliya figurine tradition, and Kulaksizlar is the only known manufacturing spot

for Kiliya-type idols. Tr. 373:16-24 (Brodie); Tr. 837:4-13 (Anderson); PTX 284, Brodie Decl., ¶ 12; DTX 13A (Kulaçoğlu) at 77:19-25; DTX 201D, Anderson Decl., ¶ 29. Its size and near-mint condition make it among the most exceptional examples of Kiliya-type idols known to exist. Dkt. No. 307, Stipulated Fact No. 12.

Where the Idol traveled to after its manufacture is more of a mystery. Idols of this kind were likely traded or exchanged. The known find-spots of other Kiliya-type idols supports this conclusion; one idol, for instance, was found in Kiliya, which is in the Gallipoli peninsula. Tr. 903:21–904:9 (Anderson). To date, no complete Kiliya-type idol has been found in Kulaksizlar. The exact reach of those trade or exchange networks, however, is unclear. Turkey argues that the trade networks were limited to nearby societies, relying primarily on the testimony of its expert witness, Dr. Neil Brodie. *See* PTX 284, Brodie Decl., ¶¶ 12-15; Tr. 413:23–414:13, 431:6–14, 431:23–432:2, 417:11–22 (Brodie). The Defendants take a more expansive view. Their expert witness, Dr. Maxwell Anderson, points to evidence of Greek tools from the paleolithic period—around 5,000 years before the Chalcolithic period—found in Kulaksizlar as evidence that the trade networks reached, or could have reached, the islands of the Aegean Sea. Specifically, Dr. Anderson was discussing the findings of a 2018 report from excavations at Kulaksizlar, which mentioned "30 [Paleolithic] obsidian tools . . . 27 of [which] were determined to have originated from the Greek island of Milos." DTX 61 at 2. The report also discusses the find in Kulaksizlar of a "miniature jadeite ax …which could have originated from the island of Syros." *Id.* *See also* DTX 201D, Anderson Decl., ¶ 34(c) (noting that the jadeite axe found at Kulaksizlar was traded concurrently with the date of the Idol). The 2018 Report concluded that "Kulaksizlar had an existence within the cultural interaction networks accepted to have been actively present during the Middle Chalcolithic Age." *Id.*

At a minimum, the evidence of these Greek tools in Kulaksizlar supports the proposition that it was technologically *feasible* for societies in the Aegean to trade with societies in Anatolia, including the Kulaksizlar region. But it is enough to say that there is insufficient evidence to support Turkey's view that the idols could not have been traded to the Aegean or to other regions outside of the boundaries of modern-day Turkey. On the contrary, the Court finds that such trade was feasible.

Kiliya-type idols continued to circulate in modern times, including before 1906. While Kiliya-type idols originated in Turkey, these idols have circulated outside of Turkey for at least 120 years. DTX 11A (Dinç) at 70:9-71:5. As proof of this, there are at least two Kiliya-type idols that were known to have existed outside of Anatolia prior to 1906. The first is currently in the Mytilene Museum on the Greek island of Lesbos. Tr. 899:20-900:14 (Anderson); PTX 266 ¶ 4. The second was found on the Gallipoli peninsula; that Kiliya-type idol was first published in 1902 and is today in Athens. PTX 266 ¶ 1; DTX 201D, Anderson Decl., ¶ 31. Those examples of Kiliya-type Idols that left Turkey prior to 1906 support the Defendants' position that the fact that the Idol was manufactured in Anatolia does not establish that the Idol remained in the boundaries of modern-day Turkey past 1906.

II. The Idol's Ownership History

The Idol emerged in New York in 1961, when J.J. Klejman, an art dealer, sold the Idol to Alastair and Edith Martin, prominent art collectors on the New York scene. *See* Dkt. No. 307, Stipulated Fact No. 5. The exact circumstances surrounding the trajectory of the Idol prior to 1961 are unclear. In part, this is because the Idol is unstratified—that is, its exact findspot and find date are unknown. There is no other direct evidence establishing even an approximate find spot and date or linking the Idol's excavation or discovery to anyone in particular. How Klejman

came across the Idol is also a mystery. There is no evidence in the record to establish where he first encountered the Idol, how the Idol came to be in his possession, or when and how he brought the Idol to the United States. All that the Court can reasonably find is that in 1961, Klejman sold the Idol to the Martins.

The Martins owned the Idol for the next 22 years, and it formed a part of their renowned Guennol Collection. In 1983, they transferred the Idol to Buttercup Beta Corporation, owned by Alastair Martin's son, Robin Martin, and his children. Dkt. No. 307, Stipulated Fact No. 8. The Buttercup Beta Corporation was the Idol's owner for the next decade, until it sold the Idol to the Merrin Gallery on July 16, 1993. Dkt. No. 307, Stipulated Fact No. 9. Defendant Michael Steinhardt and his wife, Judy Steinhardt, then acquired the Idol from the Merrin Gallery on or around August 16, 1993. The Steinhardts have been the owners of the Idol since then. At trial, Mr. Steinhardt testified credibly about the circumstances surrounding his acquisition of the Idol. As he described, and as defense witness Samuel Merrin corroborated, Steinhardt spoke to a number of experts about the Idol prior to purchasing it, including Prudence Harper, Carlos Picon, and Joan Mertens. Tr. 614:1-12, 621:11-21 (Steinhardt); Tr. 493:7–9 (Merrin). He also testified that none of them raised any potential concerns about the provenance of the Idol, and that he trusted their expert opinion that the Idol was worth purchasing.[1]

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[1] Prior to trial, Turkey sought permission to introduce certain "other acts" evidence regarding the circumstances of Steinhardt's acquisitions of other antiquities. It did so under the theory that Steinhardt had a propensity for disregarding provenance when considering whether to purchase antiquities. In a pre-trial order, the Court denied Turkey's motion, concluding that Turkey's original theory of Steinhardt's allegedly unclean hands was precluded by the law of the case, which had already established that Steinhardt purchased the Idol in good faith. The Court also deemed the evidence irrelevant to Turkey's defense as to laches and impermissible under both Rule 404(b) and Rule 403. *See* Dkt. No. 417; *see also* Tr. 460:17–465:7. Having the benefit of presiding over the trial, the Court reaffirms its conclusion that such evidence would have been impermissible under Rule 401, Rule 403, and Rule 404(b).

In 2017, the Steinhardts attempted to sell the Idol. On March 1, 2017, Michael Steinhardt entered into an agreement with Christie's to consign the Idol to Christie's for sale by auction. For this purpose, Steinhardt agreed to appoint Christie's as his exclusive agent. Dkt. No. 307, Stipulated Fact No. 62. The next day, Steinhardt consigned the Idol to Christie's for sale, and the Idol was delivered to Christie's. Dkt. No. 307, Stipulated Fact No. 63. Christie's listed the Idol in the catalogue for its April 28, 2017 auction. Dkt. No. 307, Stipulated Fact No. 64. As a result of this litigation, prior to opening bidding on the Idol on April 28, 2017, Christie's read a statement explaining that Turkey had asserted a claim to the Idol; in doing so, Christie's noted that the buyer would have a right of cancellation if not satisfied with the terms of the sale. Dkt. No. 252 ¶ 29. The Idol ultimately sold for a high bid of $12,700,000. *Id.* ¶ 30. The buyer, however, never took possession of the Idol, though the parties contest whether he ultimately "canceled the purchase," or "withdrew from consummating the sale." *Id.* ¶¶ 31–32. As a result of this, the Idol remains in Christie's possession. Dkt. No. 252 ¶ 2. *See also Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204, 209 (S.D.N.Y. 2019)

III. Display and Publication History

The Idol's prominence began to rise after the Martins acquired the Idol in 1961. In 1967, the Martins loaned the Idol to the Metropolitan Museum of Art for public display. The Idol was exhibited in the Met's permanent galleries from 1968 through 1993, with very few interruptions. Dkt. No. 307, Stipulated Fact No. 7; DTX 44 No. 5, 6, 8; DTX 54; DTX 55; *see also* DTX 102. As a result, the Idol was included in the *Centennial Exhibition of the Guennol Collection* in 1969–1970. DTX 54; DTX 55 at 6. Documents from the Met's archives indicate that during this period, the text of the gallery label for the Idol identified it as being Anatolian and a part of the Guennol Collection. DTX 59, 60, 121, 154; *see also* DTX 201A, Bernheimer Decl., ¶¶ 5–6;

DTX 201D, Anderson Decl., ¶ 36. After the Steinhardts acquired the Idol in 1993, the Idol was removed from the Met. In 1999, Steinhardt followed in the Martins' footsteps by loaning the Idol to the Met, where it was displayed until 2007. Stip. No. 24; DTX 44 No. 11; DTX 52, 57, 58; DTX 201BB, Steinhardt Decl., ¶ 28. During this time, the gallery label identified the Idol as Anatolian and specifically mentioned that it was on loan from the Judy and Michael Steinhardt Collection, New York. Dkt. No. 307, Stipulated Fact No. 24; DTX 44 No. 11; DTX 52, 57, 58; DTX 201BB, Steinhardt Decl., ¶ 28. In 2007, the Steinhardts retook possession of the Idol from the Met.

The decades of public display at the Met contributed to public awareness of the Idol's existence, but equally important was the history of publications discussing the Idol, identifying it as Anatolian and discussing its origins, referencing its place in the Guennol Collection, and indicating that it was located in the United States. The first of these was in 1964, when Herbert Hoffman published The Beauty of Ancient Art: Exhibition of the Norman Schimmel Collection. DTX 72. In 1974, Hoffman again mentioned the Idol in O.W. Muscarella's *Ancient Art: The Norbert Schimmel Collection*. DTX 73. In 1975, Elizabeth Rohde published an article that references the Idol. DTX 5 at 12; DTX 75A. Later, Prudence Harper, former curator in charge of the Met's Department of Ancient Near Eastern Art, published a two-volume work on the Guennol Collection that discusses the Idol and includes a photograph of it. DTX 77; DTX 201D, Anderson Decl., ¶ 64. Patricia Getz-Preziosi, a leading scholar of Neolithic and Chalcolithic statuettes, wrote an introduction for a publication in 1985 that references the Idol and includes an image. DTX 79. In 1986, Getz-Preziosi wrote a section of Martha Sharp Joukowsky's 1986 "Prehistoric Aphrodisias," which references the Idol and includes images of it. In 1990, Getz-Preziosi again referenced the Idol in a different publication. DTX 82.

Some of the publications had express ties to Turkey. Among the most notable publications that discussed the Idol is Jurgen Seeher's 1992 article, *Anatolian Marble Statues of the Kiliya-Type*. Seeher was in residence at the German Archaeological Institute in Istanbul at that time. DTX 44 No. 49. And in 2014, Önder Bilgi, an archaeology professor at Istanbul University, published a book, *Anthropomorphic Representations in Anatolia*, that names the Idol and features an image of it. DTX 189; DTX 201D, Anderson Decl., ¶ 50(e)(xiii).

Perhaps the most important public commentator on the Idol and its history was Özgen Acar, a prominent Turkish reporter considered to be one of the leading journalists on Turkish cultural heritage issues. Tr. 66:7–67:4 (Boz); DTX 11A (Dinç) at 29:3-14. Acar's 1989 article, *History for Sale Again*, published in Turkey in Cumhuriyet, a well-known newspaper, mentioned a Kiliya-type idol in the Guennol Collection. Dkt. No. 307, Stipulated Fact Nos. 29, 30; DTX 19A (Zoroğlu) at 226:11–13; DTX 81A. Acar had ties to Turkey's Ministry of Culture, having served at one point as consultant to former Minister of Culture Durmuş Fikri Sağlar, who served in the position in the 1990s. In 2017, Acar again wrote about the Idol after he learned that it was being auctioned at Christie's. DTX 63.

IV. Turkey's Awareness

By the 1990s, awareness of the Idol in Turkey had reached new levels. In 1991, Rafet Dinç, a prominent specialist on Turkish antiquities, was working at the state-owned Manisa Museum when he learned about Kiliya-type idols. DTX 64A at n.1; DTX 219. In the early 1990s, Acar visited the Manisa Museum and showed Dinç photographs of Kiliya-type idols; Acar was the guest of the museum's director, and the director was present when Acar and Dinç discussed Kiliya-type idols. DTX 11A (Dinç) at 29:15–30:6. At around this time, Dinç read Seeher's article, which listed the Guennol Collection in New York as having a Kiliya-type idol.

DTX 11A (Dinç) at 103:10–104:7. Dinç then left the museum to teach at a state-owned university in 1993, though he continued working with the Ministry of Culture on Kiliya-type idols. DTX 64A, 87–88.

Dinç continued researching Kiliya-type idols throughout the 1990s. In the early 1990s, he sought to excavate near Kulaksizlar; the Ministry of Culture only gave him permission to conduct a surface survey. After doing so, he reported to the Ministry that "Kiliya-type marble idols are of Anatolian origin and are spread in museums and private collections across the world." Stip. No. 57; PTX 283 ¶9; DTX 11A (Dinç) at 176:11–18; DTX 64A, 158; DTX 201C ¶ 92. He presented his findings from the 1994 surface survey at a May 1995 symposium that was sponsored by the Ministry of Culture and at which employees of the Ministry were present. Stip. No. 56; DTX 44 No. 101; DTX 87B. In his presentation, Dinç discussed archaeological evidence he discovered in 1994 that Kulaksizlar was a marble workshop for the production of Kiliya-type idols. DTX 87B. The Ministry published Dinç's 1995 presentation the following year.

The Ministry then permitted Dinç to conduct another surface survey at Kulaksizlar in late 1995. Stip. Nos. 57, 58, 60; DTX 44 No. 122. Dinç presented his findings of the 1995 survey in May 1996 at a symposium in Ankara sponsored by the Ministry of Culture—again with Ministry employees present. Stip. No. 60; DTX 11A at 203:21-204:17; DTX 44 No. 125; DTX 65. That presentation included specific mention of the Idol. DTX 88A at 261. In 1997, the Ministry published Dinç's 1996 presentation. *Id.* at 261.

Also in 1997, the Ministry published Dinç's 1996 "Research Results" essay that identified a Kiliya-type idol in the Guennol Collection in New York. DTX 11A (Dinç) at 135:4-138:5; DTX 44 No. 136; DTX 88A at 261. As a general matter, the Ministry sends copies of the

symposium publications to museums and archaeologists across Turkey. DTX 13A (Kulaçoğlu) at 18:17-19:10, 91:11-92:10; DTX 19A (Zoroğlu) at 52:22-53:10. The Ministry also published Dinç's 1997 essay, which identified the Idol as having been part of the Guennol Collection in New York, on its website. DTX 13A (Kulaçoğlu) at 59:22–61:3.

In 2013, one scholar reported to the Office of the Director General that a Kiliya-type idol had been sold at Christie's in 2010; in doing so, he identified the Stargazer as having been part of the Guennol Collection and again reiterated that Kiliya-type idols abroad originated in Anatolia. *See* DTX 66. Leadership in the Ministry of Culture were made aware of that report. Tr. 88:25–89:21 (Boz); DTX 19A (Zoroğlu) at 123:4-124:7; DTX 66.

CONCLUSIONS OF LAW

The parties agree that New York law applies to all substantive claims and affirmative defenses. *See* Dkt. No. 307, Stipulation of Law No. 2. And this Court has already concluded that under New York choice-of-law rules, Turkish law governs the question of whether Turkey has a property interest in the Idol. *See* Dkt. No. 285 at 5. But while the parties agree that Turkish law—and, in particular, the 1906 Decree—governs the question of whether Turkey has a property interest in the Idol, they dispute whether the 1906 Decree is enforceable.

The Court begins with the plain language of the decree. In determining whether foreign law vests ownership of antiquities in the state, courts must look first to the plain language of the relevant law. *See United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003) (analyzing Egyptian statute's text first). In this case, "the language of the [Decree] itself ... unequivocally asserts state ownership" of the Idol. *See id.* Article 4 of the 1906 Decree provides that

> [a]ll monuments and immovable and movable antiquities situated in or on land and real estate belonging to the Government and to individuals and various communities, the existence of which is known or will hereafter become known,

> are the property of the Government of the Ottoman Empire. Consequently, the right to discover, preserve, collect and donate to museums the aforementioned belongs to the Government.

Dkt. No. 202-7 at 23. The Decree defines antiquity as "[a]ny work or any kind of product without exception, by any and all types of ancient peoples which once existed in or on the lands ruled by the Ottoman Government, related to fine arts, science, literature, religion and craft." *Id.* As this Court already concluded, under the plain terms of the decree, movable and immovable antiquities found on both public and private lands were "the property of the Government of the Ottoman Empire" during the time of its existence, and of modern-day Turkey thereafter. *See Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204, 215 (S.D.N.Y. 2019).. In its 2019 opinion, the Court acknowledged that the Defendants could offer evidence that the law is "not what its plain language indicates it is." Dkt. No. 468 at 37 (citing *United States v. Schultz*, 333 F.3d 393, 401–02 (2d Cir. 2003)). The Defendants have attempted to do so, relying on enforcement statistics, historical evidence regarding the existence of private ownership of antiquities, and an expert witness who testified that the law is not what it says it is. Dkt. No. 470 at 37–41. Having considered the Defendants' arguments and evidence, however, the Court remains unpersuaded that the 1906 Decree means something other than what it says. The 1906 Decree is therefore an ownership law, and it controls the question of whether Turkey has an ownership claim to the Idol. As a result, Turkey prevails if it can establish extraction in modern day Turkey after 1906.

I. Turkey has not established its entitlement to the Idol under the 1906 Decree

To prevail on its claims for conversion and replevin, Turkey first bears the burden of establishing its rights, if any, to ownership of the Idol. *Schoeps v. Museum of Modern Art,* 594 F. Supp. 2d 461, 464 (S.D.N.Y. 2009). On a conversion claim, a plaintiff must establish (1) its

"possessory right or interest in the property"; and (2) defendants' "dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito v. N.Y. Organ Donor Network, Inc.,* 8 N.Y.3d 43, 50 (2006). In an action for replevin, the plaintiff "'must establish that the defendant is in possession of certain property of which the plaintiff claims to have a superior right.'" *Dore v. Wormley,* 690 F. Supp. 2d 176, 183 (S.D.N.Y. 2010) (quoting *Batsidis v. Batsidis,* 778 N.Y.S. 2d 913, 913 (2d Dep't 2004)).

This Court has previously held, and the parties agree, that in order for Turkey to establish ownership under the 1906 Decree, it must prove by a preponderance of the evidence that the Idol was found within and exported from the boundaries of modern-day Turkey after 1906 while the Decree was in effect. Because the Court concludes that Turkey has failed to do so, Turkey cannot establish its entitlement to the Idol under the 1906 Decree.

A. Location of the Idol

The Court begins with where the Idol was found. Turkey advances a number of theories as to why it is entitled to an inference that the Idol was found in modern-day Turkey. Turkey first argues that the Court should assume that the Idol was found in modern-day Turkey because it originated in Anatolia. Dr. Neil Brodie, Turkey's expert witness, argues primarily that the evidence of the Anatolian origins of the Idol, combined with the evidence of the scope of the trade or exchange networks, supports the inference that the Idol was discovered or excavated in Anatolia. *See* PTX 284, Brodie Decl., ¶¶ 6, 12–21. The Court is unpersuaded. The mere fact that the Idol was manufactured in Anatolia is insufficient for Turkey to prove that the Idol was *found* in modern-day Turkey, thousands of years after the Idol was manufactured. Most notably, and as already noted, there is no direct evidence of the path that this particular Idol took after manufacture. Its location prior to 1961 is unknown. *See* PTX 284, Brodie Decl., ¶ 25; PTX 283,

Boz Decl., ¶ 12. And Turkey's circumstantial evidence is unavailing, particularly in light of the fact that the Idols were circulated around the region after their manufacture.

While the exact parameters of the Chalcolithic trade networks are unknown, Turkey's arguments that the trade networks did not extend beyond Anatolia are not founded in specific evidence. Turkey's expert witness, Dr. Neil Brodie, testified that there is no evidence that Kiliya-type Idols were traded beyond Anatolia, but Dr. Brodie's testimony was, at best, inconclusive. In addition, there is some evidence that there was trade between regions of what today constitute Greece and between Kulaksizlar—namely, certain Greek tools that were found in Kulaksizlar. Those tools were manufactured around 5,000 years before the date of the Idol's production—in the paleolithic period. Tr. 414:5–13. Dr. Brodie testified that the presence of those tools could not "tell you anything about trade and exchange" of the Idol. Tr. 431:23–432:2. But even if the specific relevance of the paleolithic tools is somewhat limited in this context, they prove, at a minimum, that trade networks had existed that connected Anatolia to the land that today constitutes Greece. In that regard, the Court is unpersuaded by Dr. Brodie's expert testimony that the Idol's manufacture in Anatolia, combined with what is known of the trade networks during the Chalcolithic period, is sufficient to infer the Idol's discovery in modern-day Turkey. In contrast, the Court was persuaded by Dr. Maxwell Anderson's testimony that trade and travel during that period could have reached the Aegean. Tr. 866:3–14, 870:15-873:2 (Anderson).

In addition, the Defendants presented evidence that Kiliya-type idols have also been circulated in modern times, including before 1906. One scholar testified that these idols have circulated outside of Turkey for at least 120 years. DTX 11A (Dinç) at 70:9–71:5. In 1994, one Turkish professor wrote to a Turkish official that Kiliya-type idols had circulated outside of

Turkey for 120 years. DTX 219. Indeed, there are at least two Kiliya-type idols that were known to have existed outside of Anatolia prior to 1906. The first is currently in the Mytilene Museum on the Greek island of Lesbos. Dr. Anderson testified that the Idol was likely acquired before 1865. Tr. 899:20–900:14 (Anderson); PTX 266 ¶ 4. The second was found on the Gallipoli peninsula; that Kiliya-type idol was first published in 1902 and is today in Athens. PTX 266 ¶ 1; DTX 201D, Anderson Decl., ¶ 31. Taken together, this evidence establishes that the Idols were transported both during the Chalcolithic period and in the 19th and early 20th centuries. Thus, on this record, the mere fact that the Idol was manufactured in Kulaksizlar is insufficient to warrant an inference that the Idol was found in modern-day Turkey.

Nor does JJ Klejman's role in bringing the Idol to the United States support Turkey's contention that a preponderance of the evidence proves the Idol's discovery in modern-day Turkey. Dr. Brodie testified that Klejman was "a primary conduit into the United States for material looted from Turkey and the Middle East." PTX 284, Brodie Decl., ¶ 20. Brodie based this opinion on the memoir of Thomas Hoving. *Id.*; *see also* PTX 66. And while Klejman was involved in bringing the Lydian Hoard to the United States, Brodie's testimony proves too much; Hoving's memoir does not reveal much about Klejman's specific trading practices, whether as it relates to Turkey or any other country that was beset by looting in the 19th and 20th centuries. So the Court gives little credit to Brodie's testimony that Klejman's involvement provides support for the fact that the Idol was found in modern-day Turkey.

For these reasons, the Court is unpersuaded by Turkey's contention that it is entitled to an inference on this trial record that the Idol was found in modern-day Turkey. Turkey did not carry its burden of proving by a preponderance of the evidence that the Idol was found in modern-day Turkey.

B. Date of Discovery

The precise date of the Idol's discovery, excavation, or export is unknown. There is no evidence of the excavation or export—including photographs and testimony of direct witnesses. *See* DTX 10A (Bozkurtlar) at 125:25-126:18; DTX 17A (Talaakar) at 79:19-80:6; DTX 19A (Zoroğlu) at 254:6-12; DTX 201D, Anderson Decl., ¶ 75. And it is uncontested that at least two Kiliya-type idols were excavated before 1906. Tr. 899:20-900:14 (Anderson); PTX 266 ¶¶ 1, 4; DTX 201D, Anderson Decl., ¶ 31. Unlike in those examples, there is no direct evidence of when this Idol was found. So as above, in the absence of direct evidence Turkey relies on circumstantial evidence to establish that the Idol was excavated or discovered after 1906. The Court was not persuaded.

Turkey contends that the Court should infer that the Idol's discovery and export occurred after 1906 because the Idol first appeared in 1961 and stolen or looted antiquities often arrive quickly on the market. *See* Dkt. No. 468 ¶¶ 119, 121, 123. In doing so, it relies largely on the testimony of Dr. Brodie, who testified that the Idol would have been well-known had it been discovered before 1961. *Id*. Perhaps, but the Court was persuaded by the testimony of Dr. Anderson, the Defendants' expert witness, who testified that there are numerous reasons of why an object might not surface immediately after its discovery. DTX 201D, Anderson Decl., ¶ 35. The Court need not exhaust the universe of possibilities, however, because the mere fact that the Idol surfaced in 1961 is plainly insufficient to establish that the Idol *must* have been found after 1906. Indeed, of the two Idols that are known to have been excavated prior to 1906, neither generated significant attention among scholars or collectors of antiquities. *See* PTX 266 ¶¶ 1, 4. It is therefore just as possible that the Idol was discovered prior to 1906 but did not attract much attention until decades later, when it found its way to JJ Klejman. Yet again, the dearth of direct

evidence and the weakness of circumstantial evidence precludes Turkey's satisfaction of its burden. Turkey did not establish by a preponderance of the evidence that the Idol was discovered, excavated, or exported after 1906, when the decree was in effect.

In sum, Turkey bears the burden of proof of establishing by a preponderance of the evidence that it has an ownership claim to the Idol. In order to prevail, Turkey would have to show that the Idol was excavated within the boundaries of modern-day Turkey sometime after 1906. Having carefully considered the substantial trial record, the Court concludes that Turkey has not satisfied its burden. In light of this, Turkey's claims for conversion and replevin fail.

II. Defendants' laches defense bars Turkey's claims

Even if Turkey had established its claim of ownership over the Idol, the Court would still rule that the doctrine of laches bars Turkey's claim over the Idol. The equitable defense of laches is governed by New York law. Dkt. No. 307, Stipulation of Law No. 2; *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012). To prevail on their laches defense, Defendants must show that Turkey "inexcusably slept on its rights so as to make a decree against the defendant unfair. Laches . . . requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action.'" *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 193 (2d Cir. 2019) (citation omitted). *See also Bakalar*, 819 F. Supp. 2d at 203 ("In order to prove laches, [Defendants] must show that: (1) [Plaintiff was] aware of [its] claim, (2) [Plaintiff] inexcusably delayed in taking action; and (3) [Defendants were] prejudiced as a result." (citation omitted)). It is enough, under New York law, that a party "*should have* known" of its claim. *Bakalar*, 819 F. Supp. 2d at 303 (citations omitted) (emphasis added). In conducting the laches analysis, courts take into account both parties' diligence. *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S. 2d 618, 623 (App.

Div. 1990) ("defendant's vigilance is as much in issue as plaintiff's diligence. . . . The reasonableness of both parties must be considered and weighed.").

A. Turkey's awareness

For purposes of the doctrine of laches, the Defendants need only prove that Turkey knew of, or should have known of, the circumstances giving rise to the claim, even if it could not ascertain the current possessor of the object in question. *Bakalar*, 819 F. Supp. 2d at 304 (citation omitted). In conducting this kind of analysis, it is relevant that the missing object was widely discussed in the literature or put in public display, particularly when the object in question is well-known. *See Zuckerman*, 928 F.3d at 192–194 (finding that delay was unreasonable where the painting, a "masterwork" by Picasso that was "not an obscure piece of art," was on display at the Met, "a major public institution," and had been "published in the [museum's] published catalogue of French paintings" since 1967); *see also Matter of Peters v. Sotheby's Inc.*, 821 N.Y.S. 2d 61, 68–69 (1st Dep't 2006) (concluding that a failure to make a demand for the painting at issue was unreasonable where "the painting was exhibited as part of the [owner's] collection at prominent museums, galleries, and universities").

The Court need not determine the precise date on which Turkey *knew* of its claim because it concludes that Turkey *should have* known of its claim decades before 2017, when it finally initiated its attempt to recover the Idol. As discussed above, the Idol was widely discussed in the literature starting in the 1960s, and it was in near-constant display at the Metropolitan Museum of Art for decades. The Court will not recount the entire publication and display history, but it finds especially relevant to the Defendants' laches defense that as early as the 1980s and early 1990s—before Steinhardt even bought the Idol—the Idol was discussed in Turkish publications by academics with connections to the Ministry of Culture. Dinç was

working in a state-owned museum when he learned about Kiliya-type idols in 1991, and he was made aware of Seeher's article, which listed the Idol as belonging to the Guennol Collection in New York, in the early 1990s. DTX 11A (Dinç) at 103:10-104:7. In the 1990s, Dinç reported to the Ministry "Kiliya-type marble idols are of Anatolian origin and are spread in museums and private collections across the world." Stip. No. 57; PTX 283 ¶ 9; DTX 11A (Dinç) at 176:11-18; DTX 64A, 158; DTX 201C ¶92. And he twice presented his findings in events sponsored by the Ministry of Culture, which published both presentations. Indeed, in 1997, the Ministry published Dinç's 1996 "Research Results" essay that identified a Kiliya-type idol in the Guennol Collection. DTX 11A (Dinç) at 135:4-138:5; DTX 44 No. 136; DTX 88A at 261. As noted above, the Ministry also published Dinç's 1997 essay, which identified the Idol as having been part of the Guennol Collection in New York, on its website. DTX 13A (Kulaçoğlu) at 59:22–61:3.

Turkey argues that even if there is evidence regarding its awareness of the existence of the Idol, the evidence would not support the proposition that Turkey was, or should have been, aware of any potential claim it could assert to recover the Idol. The Court is unpersuaded. As a preliminary matter, Turkey claims ownership over all objects found in Turkey. *See Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44, 45–47 (S.D.N.Y. 1990). The Idol has universally been described as Anatolian in the literature and in its display history. Awareness of the existence of the Idol, should have put Turkey on notice as to its potential claim—at least enough to inquire further. Notwithstanding the prominence of the Idol, however, Turkey took no steps to ascertain whether it was entitled to ownership over the object despite being aware of its existence for decades.

Nor is the Court persuaded by Turkey's argument that it cannot be expected to inquire as to any objects around the world that are described as being of Anatolian origin. *See* Dkt. No. 471 at 17–18. The Court agrees that such an expectation would be unreasonable, but it finds that the specific facts of this case do not compel such a broad conclusion regarding when Turkey is expected to inquire as to a potential claim. Here, there is evidence that government officials were made aware of *this* specific Idol as early as the 1990s, in contexts that described the Idol as being of Anatolian origin. Thus, the point is certainly not that Turkey has an obligation to seek out or inquire all artefacts described as being of Anatolian origin. Rather, the narrower conclusion is that on the facts of this case, where there is evidence that Turkey was presented with information that the Idol was of Anatolian origin and that the Idol was historically significant, and that only then did Turkey have a duty either to inquire further or to risk facing a laches defense if it initiated an enforcement action in the future. Altogether, the Defendants have satisfied their burden of showing that Turkey should have known of the circumstances giving rise to its claim significantly earlier than 2017. *See Bakalar*, 819 F. Supp. 2d at 304.

B. Inexcusable delay

It is undisputed that Turkey took no action with respect to the Idol until shortly before initiating this action. The knowledge prong of the laches analysis is intertwined with the scope of required diligence, as any potential claimant must act reasonably on the basis of any information it possesses or should possess. *Bakalar*, 819 F. Supp. 2d at 304. As already noted, the Court concludes that the evidence shows that Turkey was, or should have been aware, of the existence of the Idol, of its historical significance, of its Anatolian origins, and of its location in New York by the 1990s, if not sooner. So the relevant question, for purposes of assessing the

strength of the Defendants' laches defense, is whether Turkey inexcusably delayed in taking action. The Court concludes that it did.

Relevant here is the fact that Turkey failed to take *any* steps to even *inquire* as to the origins of the Idol, how it made its way to New York, and whether it had any potential claim. Such a failure to inquire or investigate is probative of inexcusable delay, even when the precise elements of a potential claim—including the unlawful possessor of the object—are unknown. *See, e.g.*, *Sanchez v. Trs. of the Univ. of Pa.*, No. 04-cv-1253 (JSR), 2005 U.S. Dist. LEXIS 636, at *8 (S.D.N.Y. Jan. 13, 2005); *Greek Orthodox Patriarchate v. Christie's, Inc.*, No. 98-cv-7664 (KMW), 1999 U.S. Dist. LEXIS 13257, at *23–31 (S.D.N.Y. Aug. 18, 1999). Turkey's expert witness was unable to identify any step that Turkey took to inquire or investigate in the decades following the dissemination of information in Turkey regarding the Idol and the start of this action. *See* Tr. 368:6-20 (Brodie). The Court finds it especially relevant that Turkey was, or should have been aware, that the Idol was on display at the Metropolitan Museum of Art. As the Second Circuit has observed, the Met is a "major public institution," *Zuckerman*, 928 F.3d at 194, and the Met did not hide that the Idol was part of the Guennol Collection. Turkey failed to contact the Met seeking more information about the origins of the Idol—a relatively low bar, all things considered, and one that Turkey should reasonably have surpassed.

Thus, the Court concludes that Turkey inexcusably delayed in taking action and finds that this element of the analysis also supports a finding of laches. At a minimum, Turkey should have inquired once it knew that the Idol was of Anatolian origin, that it was historically significant, and that it was located in New York.

C. Prejudice

The third element of a laches defense is that the moving party was prejudiced as a result of the opposing party's unreasonable delay. *Zuckerman*, 928 F.3d at 194. "A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim." *Conopco Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996). When assessing prejudice, courts consider "the decreased ability of the defendants to vindicate themselves, on account of the death of witnesses or fading memories and stale evidence, as well as the prejudice that may result from a change in the defendant's position." *Merchant v. Lymon*, 828 F. Supp. 1048, 1063 (S.D.N.Y. 1993). In *Zuckerman*, for instance, the Second Circuit concluded that the Met was prejudiced as a result of "'deceased witness[es], faded memories, . . . and hearsay testimony of questionable value,' as well as the likely disappearance of documentary evidence." *Zuckerman*, 928 F.3d at 194 (quoting *Lubell*, 153 A.D. 2d at 149).

The Defendants' ability to mount a defense was unquestionably impacted by the death of potential witnesses and the loss of documentary evidence. For instance, the Defendants were unable to seek out evidence regarding how the Martins came to possess the Idol, including the circumstances in which JJ Klejman came across the Idol. By the time this action was initiated, Alastair Martin, Edith Martin, and JJ Klejman had all died. As a result, the Defendants were hampered in their ability to marshal evidence that could rebut Turkey's theory of the circumstances leading up to the Idol's transport to the United States. For instance, Klejman could have testified that he acquired the Idol somewhere outside of Turkey, circumstantial evidence that would support the Defendants' claim that the Idol was not discovered or excavated in Turkey. And because such testimony could have supported Defendants' claim that Turkey does not hold valid ownership over the Idol, the dearth of that testimony is prejudicial. *Cf. Reif*

v. Nagy, 106 N.Y.S. 5, 22–23 (1st Dep't 2019) (declining to find prejudice where the lost testimony "could not have shown she had good title to the Artworks and her testimony would not have been probative."). As a result of the death of these witnesses—after Turkey should have been made aware of its claim but before it initiated this action—Turkey deprived the Defendants of the ability to seek out relevant information or testimony that would support their defenses. Such prejudice is of the kind courts have deemed relevant for laches purposes in the past. *See Bakalar*, 819 F. Supp. 2d at 306; *see also Zuckerman*, 928 F.3d at 194 ("No witnesses remain who could testify on behalf of the Met that the Sale was voluntary, or indeed on behalf of the Plaintiff that the Painting was sold 'involuntar[ily].'").

Equally notable is that, had Turkey pursued its potential claim or inquired as to the provenance of the Idol prior to 1993, it is quite possible that Steinhardt would have never purchased the Idol. He purchased the Idol in 1993 without any claims or expressions of interest by Turkey that could put him on notice as to the potential contested nature of the Idol's ownership. Had Turkey inquired as to the provenance of the Idol, or argued that it held a potential claim as to the Idol, Steinhardt may not have purchased the Idol in the first place. That, too, is cognizable prejudice for purposes of laches. *See Matter. of Peters v. Sotheby's, Inc.*, 821 N.Y.S. 2d 61, 68 ("the very default by the [claimants] in timely asserting their possessory rights provided legitimacy to [the buyer's] acquisition").

For the reasons stated above, the Court concludes that the Defendants have established by a preponderance of the evidence that they were prejudiced by Turkey's delay.

D. Diligence

In its September 30, 2019 Opinion and Order, the Court concluded that "there is no evidence in the record that Steinhardt is a bad faith possessor." *Republic of Turkey v. Christie's*

Inc., 425 F. Supp. 3d 204, 211 (S.D.N.Y. 2019). The Court reached that conclusion because Turkey conceded that Steinhardt was not a bad faith possessor. *See id.* at 211. In rebutting the Defendants' laches defense, Turkey insists that even though Steinhardt is a good-faith purchaser, the Court should conclude that his purported lack of diligence weighs against a finding of laches. Turkey predicates this argument on its contention that Steinhardt was presented with sufficient red flags as to the Idol's provenance that he had acquired a duty to inquire or investigate prior to completing the purchase. The Court is unpersuaded, concluding instead that the relevant evidence in the record shows that Steinhardt was, in fact, diligent in the lead-up to the 1993 purchase of the Idol.

The Court begins with the argument that Steinhardt had a duty to investigate further after being presented with "red flags" regarding the Idol's provenance. As an ordinary purchaser, Steinhardt has no standalone duty to investigate, even if such a duty would attach to art dealers, museums, or other commercial actors. *See Graffman v. Espel*, No. 96 Civ. 8247 (SWK), 1998 WL 55371, at *6 (S.D.N.Y. Feb. 11, 1998) ("The Does are not art dealers and are under no obligation to adhere to commercial standards applicable to art dealers."). As in *Bakalar*, Steinhardt, "as an ordinary non-merchant purchaser of art, had no obligation to investigate the provenance of the Drawing, and this Court will not saddle him with a greater duty than the law requires." *Bakalar*, 819 F. Supp. 2d at 306.

In any event, Turkey's claim that Steinhardt failed to inquire is contradicted by the record. The Court found Steinhardt to be a credible witness, and Steinhardt detailed the efforts he took prior to purchasing the Idol to gather more information about the history and the origins of the Idol. Steinhardt asked questions of the Merrin Gallery regarding the Idol and reviewed materials about the Idol, including a report by noted expert Prudence Harper. Tr. 614:1–12,

621:11–21 (Steinhardt); Tr. 493:7–9 (Merrin). He also met with Harper and other experts, including Carlos Picon and Joan Mertens, and consulted with people he knew were more experienced. Tr. 614:1–25 (Steinhardt); DTX 201BB ¶ 16. Indeed, while the passage of time impacted his recollection somewhat, Steinhardt "think[s] [he] spoke to a number of people at the Metropolitan Museum to try to get their understanding of this one in relation to others" (Tr. 614:1-8 (Steinhardt)), as he "had the highest regard for their expertise and ethics." DTX 201BB ¶ 15. He also relied on the Met's good reputation (which, notwithstanding the Lydian Hoard controversy, was not unreasonable); the known provenance of the Idol (which dated back to the 1960s); and the reputation of the Guennol Collection to conclude that the Idol would not present problems. Indeed, Harper, who figures prominently in Steinhardt's recollection of the steps he took prior to purchasing the Idol, was described by Dr. Anderson as very cautious about provenance issues. Tr. 931:3–25 (Anderson). And while Steinhardt contended that he harbored doubts as to other objects he purchased in the past, he had also testified that he had no reason to doubt the provenance of *this* Idol. Thus, the Court concludes that Steinhardt was reasonably diligent in inquiring as to the history and the origins of the Idol.

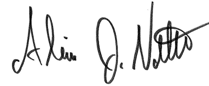
In sum, the Court concludes that Steinhardt's diligence was reasonable and that it certainly does not preclude Defendants' assertion of the laches defense. Having considered all elements of the laches defense, the Court concludes that the Defendants have shown by a preponderance of the evidence that Turkey knew or should have known of its claim, that it inexcusably delayed in taking action, and that the Defendants were prejudiced as a result. Thus, the Court finds in the alternative that the laches defense bars Turkey's claim.

III. Conclusion

For the reasons set forth above, the Court holds that Turkey did not meet its initial burden to show ownership of the Idol. Thus, Turkey's claims for replevin and conversion fail and Defendant Steinhardt is entitled to a declaratory judgment that all right, title, and interest in and to the Idol is vested in Steinhardt. The Court further concludes that even if Plaintiff met its burden of establishing ownership of the Idol under the 1906 Decree, the Defendants are entitled to judgment in their favor on their laches defense.

The Clerk of this Court is directed to enter judgment in the Defendants' favor and close the case.

SO ORDERED.



Dated: September 7, 2021
New York, New York

ALISON J. NATHAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Republic of Turkey,

Plaintiff,

-against-

Christie's, Inc.,

Defendant.

Michael Steinhardt,

Defendant-Counterclaimant,

Anatolian Marble Female Idol of Kiliya Type,

Defendant-in-rem.

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17 **CIVIL** 3086 (AJN)

JUDGMENT

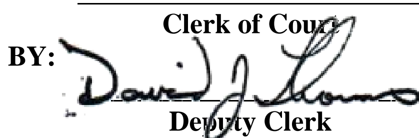
It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Findings of Fact and Conclusions of Law dated September 7, 2021, the Court holds that Turkey did not meet its initial burden to show ownership of the Idol. Thus, Turkey's claims for replevin and conversion fail and Defendant Steinhardt is entitled to a declaratory judgment that all right, title, and interest in and to the Idol is vested in Steinhardt. The Court further concludes that even if Plaintiff met its burden of establishing ownership of the Idol under the 1906 Decree, the Defendants are entitled to judgment in their favor on their laches defense. Judgment is entered in Defendants' favor and the case is closed.

Dated: New York, New York
September 7, 2021

RUBY J. KRAJICK

Clerk of Court

BY:



Deputy Clerk